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FOREWORD

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THE ALBANY LAW REVIEW

of

RECENT DECISIONS

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CONSTITUTIONAL LAW - SOCIAL SECURITY ACT

THE VALIDITY OF THE TAX IMPOSED BY THE SOCIAL SECURITY ACT (42 U.S.C.A.§§301-1305) ON EMPLOYERS OF EIGHT OR MORE, DECLARED CONSTITUTIONAL.

Charles G. Steward Mach.Co. v. Davis (___U.S.___, 57 S.Ct.883, 81 L.Ed.779) was a suit by the Charles C. Steward Machine Company against Harwell C. Davis, individually and as collector of Internal Revenue for the District of Alabama.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment (§46.14), asserting a conflict between the statute and the Constitution of the United States.

The Social Security Act (Act of August 14, 1935, Ch.531, 49 Stat. 620, 42 U.S.C.A. Ch.7 (Supp.11), 42 U.S.C.A.§§301-1305) is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary.

The caption of Title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ, the tax to be measured by prescribed percentages of the total wages payable to the employer during the calendar year with respect to such employment. (§901, 42 U.S.C.A.1101) One is not, however, an "employer" within the meaning of the Act unless he employs eight persons or more. (§907a, 42 U.S. C.A.1107a). There are also limitations of minor importance. The term "employment" too has its special definition excluding agricultural labor, domestic service in a private home, and some other smaller classes. (§907c, 42 U.S.C.A.1107). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be 1%, during 1937, 2%, and 3% thereafter. The proceeds, when collected, go into the Treasury of the United States like internal recenue collected generally. (§905a 42 U.S.C.A.§1105a). They are not earmarked in any way. In certain circumstances, however, credits are allowable. (§902, 42 U.S.C.A.§1102). If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the Federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90% of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. (§902). Some of the condition thus attached to the allowance of a credit are designed to give assurance that the state employment compensation law shall be one in substance as well as in name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end there are provisions that before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." The fund is to be held by the Secretary of the Treasury, who is to invest in Government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay fro the fund, to any competent state agency, such sums as it may duly requi-

sition from the amount standing to its credit. (§904-f, 42 U.S.C.A. §1104-f).

Title III, which is also challenged as invalid, has the caption "Grants to States for Unemployment Compensation Administration." Under this title, certain sums of money are "authorized to be appropriated" for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936, to be $4,000,000, and $49,000,00 for each fiscal year thereafter. (§301, 42 U.S.C.A.§501). No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. Actually only $2,250,000 of the $4,000,000 authorized was appropriated for 1936 (Act of Feb.11, 1936, ch.49, 49 Stat.1109,1113) and only $29,000,000 of the $49,000,00 authorized for the following year (Act of June 22,1936, Ch.689, 49 Stat.1597, 1605). The appropriations, when made, are not specifically out of the proceeds of the unemployment tax, but out of any moneys in the Treasury. Other sections of the Title prescribe the method by which the payments are to be made to the state (§302, 42 U.S.C.A.§502, and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury, (§303, 42 U.S.C.A.§503). They are designated to give assurance to the Federal Government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and so arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

Of these there are only two which merit real discussion.

The excise tax is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the Act, and what is even more important, that the aim is not only ulterior, but essentially unlawful. In particular, the 90% credit is relied upon as supporting that conclusion.

The court, speaking through Mr. Justice Cardozo, said: "But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. (Cincinnati Soap Co. v. U.S., 300 U.S.___, 57 S.Ct.764, 81 L.Ed.707). There must be a showing in the first place that, separated from the credit, the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapon of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

"To draw the line intelligently between duress and inducement, there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and in dimensions. Ther was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the public welfare.

"In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state Legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still,for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire, and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the Federal Act, and later in the year. In 1936, 28 other states fell in line, and eight more the present year. But if the states had been holding back before the passage of the Federal law inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm, lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. (§House Report No.615, 74th Congress, 1st Session, p.8; Senate Report No.628, 74th Congress,, 1st Session, p.11). Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

"The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand, fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them are recognized hardships that government state or national, may properly avoid. (Henneford v. Silas Mason Co. Inc., 300 U.S.___, 57 S.Ct.524, 527, 81 L.Ed.___); Kidd v. Alabama, 188 U.S.730,732, 23 S.Ct.401, 47 L.Ed.669; Watson v. State Comptroller 254 U.S.122, 125, 41 S.Ct.43, 44, 65 L.Ed.170). If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the co-operating localities ought not in all fairness to pay a second time.

"Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state.. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. ...The difficulty with the petitioner's contention is that it confuse motive with coercion. 'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.' (Sonzinsky v. U.S., 300 U.S.57, S.Ct.554, 81 L.Ed.556). In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation... Nothing in this case suggests the exertion of a power akin to induce influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under Federal laws, administered by Federal officers, with all the ensuing evils, at least of many minds, of Federal patronage and power....." (Steward Machine Co. v. Davis, supra).

In the face of these arguments to the contrary, does not this statute coerce the states into submission to the Federal Government's will and policy? The statute operates in every state in the Union. If the state wishes to escape the burden of this tax it must have a social security act of its own. The states social security act, in order to escape the burden of the tax, must conform to certain requirements set up by the Federal Government. It is only then that there can be credit against the Federal tax. If the state desires a social security act of its own making which differs from that prescribed by the Federal Government, it must nevertheless pay to the Federal Government the prescribed tax and receive from the Federal Government absolutely no credit on its own act. To support its own act the state must appropriate additional taxes. Thus it will be seen that any state which does not desire to be subjected to the regulations of the Federal Act must shoulder an additional burden of taxation. The result must necessarily be that the businesses in states which do not subject themselves to the regulations of the Federal Act are at an economic disadvantage with those businesses in states which do choose to subject themselves to such regulations. The effect of such economic disparity in and of itself will force the states to conform their social security acts to the requirements set up by the Federal Government. If this is not coercion, it is difficult to understand what is.

Mr. Justice Butler, in his dissenting opinion, said of the tax: "Any state would be moved to conform to Federal requirements, not utterly objectionable, in order to save its taxpayers from the Federal tax imposed in addition to the contributions under state laws.

"Federal agencies prepared and took draft bills to State Legislatures to enable and induce them to pass laws providing for unemployment compensation in accordance with Federal requirements and thus to obtain relief for the employers from impending Federal exaction. Obviously the Act creates the peril of Federal tax not to raise revenue but to persuade. Of course, each state was free to reject any measure so proposed. But, if it failed to adopt a plan acceptable to Federal authority, the full burden of the Federal tax would be ex-

acted. And, as Federal demands similarly conditioned may be increased from time to time as Congress shall determine, possible Federal pressure in that field is without limit. Already at least forty-three states, yielding to the inducement resulting immediately from the application of the Federal tax and credit device, have provided for unemployment compensation in form to merit approval of the Social Security Board. Presumably the remaining States willcomply whenever convenient for their Legislatures to pass the necessary laws.

"The terms of the measure make it clear that the tax and credit device was intended to enable Federal officers virtually to control the exertion of powers of the states in a field in which they alone have jurisdiction and from which the United States is by the Constitution excluded."

It would seem from logic that Mr. Justice Butler has all the better of the argument. It would seem that the court has placed an altogether too broad interpretation - one absolutely unwarranted - on the word "induce."

The question was raised whether the Act invaded the reserved powers of the states, thus rendering the Act unconstitutional as violative of the Tenth Amendment.

The court said: "The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end." Charles C. Steward Mach.Co. v. Davis, supra. By "public agencies" was meant the states and the Federal Government. But the question immediately arises as to whether or not the Federal Government has the power to work in conjunction with the states to such a "common end." The court held that the Federal Government had such power.

In the dissenting opinion of Mr. Justice Sutherland, it was said

"The people of the United States, by their Constitution, have affirmed a division of internal governmental powers between the Federal Government and the governments of the several states, committing to the first its powers by express grants and necessary implication; to the latter, or to the people by reservation, 'the powers not delegate to the United States by theConstitution, nor prohibited by it to the States.' The Constitution this affirms the complete supremacy and independence of the state within the field of its powers. Carter v. Carter Coal Co. 298 U.S.238, 295, 56 S.Ct. 855, 865, 80 L.Ed.1160. Th Federal Government has no more authority to invade that field than th state has to invade the exclusive field of national governmental powers; for, in the oft-repeated words of this court in Texas v.White 7 Wall.700,725, 19 L.Ed.227, 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government....'

"....Nor do I doubt the authority of the Federal Govermnent and state government to co-operate to a common end, provided each of them is authorized to reach it. But such co-operation must be effectuated by an exercise of the powers which they severally possess, and not by an exercise, through invasions or surrender, by one of them of the governmental power of the other."

If we accept the conclusion that the states were coerced by the Social Security Act, and by the holding in the case of Texas v. White

(1869) 7 Wall.700, 19 L.Ed.227, the result must be that the Federal Government has invaded without the willing consent of the states, the power reserved to the states. Such must necessarily be the case, because of the fact that the care of the poor and indigent has never been the province of the Federal Government, but has always been believed to be one of the reserved powers of the states. (Texas v. White). In that case it was said:

"Can it be controverted that the great mass of the business of the Government - that involved in the social relations, the internal arrangements of the body politic, the mental and the moral cultures of men, the development of local resources of wealth, the punishment of crimes in general, the preservation of order, the relief of the needy or otherwise unfortunate members of society - did in practice remain with the State; that none of these objects of local concern is by the Constitution expressly or impliedly prohibited to the states, and that none of them is by any express language of the Constitution transferred to the United States? Can it be claimed that any of these functions of local administration and legislation are vested in the Federal Government by any implication? I have never found anything in the Constitution which is susceptible of such a construction. No one of the enumerated powers touches the subject or has even a remote analogy to it. The powers conferred upon the United States have reference to federal relations, or to the means of accomplishing or exacting things of federal relation. So also of the same character are the powers taken away from the States by enumeration. In either case the powers granted and the powers restricted were so granted or so restricted only where it was requisite for the maintenance of peace and harmony between the states or for the purpose of protecting their common sovereignty against aggression from abroad or insurrection at home.

"I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power to lay and collect taxes, duties, imports, and excises, to pay debts and provide for the common defense and general welfare of the United States, because if it has not been settled upon sound reason and authority already, it never will be. I take the received and just construction of that Article, as if written to lay and collect taxes, duties, imports, and excises in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imports. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive....."

It would seem that under the circumstances Mr. Justice Sutherland has a too-restricted concept of the actual situation. His whole opinion is based on the case of Texas v. White. Mr. Justice Sutherlan has based his holding wholly on precedent - without giving any consideration to the economic condition of the United States at the present time. The Texas v. White case was decided in 1869 when conditions were in no way similar to those existing at the present time. Conditions at that time did not require such legislation for promotion of the general welfare, and without doubt the decision of the court was justified. But at the time the Social Security Act became law, conditions in the country required such legislation. The United States was in economic chaos. The situation was such that the states were without sufficient power or strength to rectify it. Without legisla-

tion by a powerful central force there is no telling what might have happened to the Government of the United States. Under such condition as these, should not the welfare clause of the Constitution be construed broadly? Would not such a construction be legitimate? It must be admitted that such legislation is none other than legislation to promote the general welfare.

In the case of U.S. v. Butler, 297 U.S.1, 56 S.Ct.312, 80 L.Ed. 477, 102 A.L.R.914, the court passed upon the constitutionality of certain provisions of the Agrucultural Adjustment Act.

Title I of the statute is captioned "Agricultural Adustment." Section 1 (7 U.S.C.A.§601) recites that an economic emergency has arisen, due to disparity between the prices of agricultural commoditie and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

Section 2 (7 U.S. C.A.§602) declares it to be the policy of Congress "To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor,, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the base period."

The base period, in case of cotton, and all other commodities, except tobacco, is designated as that between August, 1909, and July, 1914.

In order to effectuate the declared policy, the Secretary of Agriculture is not required, but is permitted, if, in his uncontrollable judgment, the policy of the Act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable. The Secretary of Agriculture was given the power to levy processing taxes on processors and to appropriate proceeds of such exactions to payments of benefits and rentals under the adjustment contracts.

Section 12-a, 7 U.S.C.A.§612-a, appropriates $100,000,000 "to be available to the Secretary of Agriculture for Administrative expenses under this title (chapter) and for rental and benefit payments: and §12-b, 7 U.S.C.A.§612-b appropriates the proceeds derived from all taxes imposed under the Act "to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products - administrative expenses, rental and benefit payments, and refunds on taxes.

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the Act.

The United States presented a claim to the respondents as receivers of the Hoosic Mills Corporation for processing and floor taxes on cotton levied under §§9 and 16 of the Act. The receivers recommended that the claim be disallowed.

The first question raised was whether or not the so-called tax was in reality a tax. The court said (in U.S.v. Butler, supra), "The tax can only be sustained by ignoring the avowed purpose and operation of the Act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of Government. Beyond cavil the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processors and bestow it upon farmers who will reduce their acreage for the accomplishment of the proposed end, and, meanwhile, to aid these farmers during the period required to bring the prices of their crops to the desired level.... The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use.

"The statute not only avows an aim foreign to the procurement of revenue for the support of Government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production.

"The true answer to all these objections is that the power exercised in this instance is not the taxing power....The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the Government."

It will be noted that under the Social Security Act the proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. The proceeds collected are not earmarked in any way. In this respect there is no similarity between the statutes under review.

It seems that as far as constitutional questions are involved the Social Security Act and the Agricultural Adjustment Act are to a great extent fundamentally the same. In both we find legislation passed in an endeavor to overcome an evil of national dimensions; in both we find a tax on one group for the benefit of another; in both we find Federal legislation dealing with problems local in their nature. There seems to be but one distinguishing difference. In the Agricultural Adjustment Act the tax was appropriated for a determined purpose. In the Social Security Act the tax was not "earmarked" at all, but was paid into the United States Treasury in Washington as all other revenue.

To further exhibit the similarity of the Acts we can examine another question discussed by the court in U. S. v. Butler (supra). The question is this:

"If the taxing power may not be used as an instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation."

The court said of this argument: "There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regula-

tion. The power to confer or withhold unlimited benefits is the power to coerce or to destroy. If the cotton-grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin....This is coercion by economic pressure."

Is not this argument applicable in its essence to the question raised in the Social Security Case as to the coercive effect of the Federal legislation? It certainly would seem so.

In considering the question as to the invasion of the states' reserved powers, the court said in U.S.V. Butler (supra), "The question is not what powers the Federal Government ought to have, but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of Government - the state and the United States. Each state has all governmental powers save such as the people, by their Constitution, have conferred upon it and such as are reasonably to be implied from those granted..... Article I §8 of the Constitution, vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review. The third clause endows the Congress with the power 'to regulate commerce among the several states.' Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of, commerce, the Act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer." (Is not the welfare of the working man as much a local problem?)

The Government did not attempt to uphold the legislation on the commerce clause, but the clause thought to authorize the legislation confers upon the Congress power "to lay and collect Taxes, Duties, Imports and Excises, and provide for the Common Defence and General Welfare of the United States." It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare.... The agreement is that Congress may appropriate and authorize the spending of money for the "general welfare"; that the phrase should be liberally construed to cover anything conducive to national welfare;....that the appropriation under attack was in fact for the general welfare of the United States.

The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that, if it were adopted, "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the Government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers....."

While, therefore, the power to tax is not unlimited, its confines are set inthe clause which confers it, and not in those of §8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says: "The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers." (U.S. v. Butler, supra).

Again he says: "A power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them." (U.S. v. Butler).

"The Agricultural Adjustment Act is violative of the Constitution. The Act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end." (U.S.v. Butler).

Are not these statements applicable to the question of legislation for the promotion of the general welfare raised in the Social Security Case - Charles G. Steward Machine Co. v. Davis, supra?

In summary, it is my opinion that on the question as to whether or not the Social Security Act coerces or induces the States to conform with the requirements of the Federal Government, the dissenting opinions dealing with this subject have much the better of the argument.

As to the question of the Federal Government's invasion of States rights, a very serious question arises. There is no doubt that the economic chaos in which this country found itself in the last seven years has brought about conditions with which the states have been utterly unable to contend successfully. These conditions have been national in character, and have required the full strength of the Central Government to obviate their effects and lessen their unhappy results. The flood of the crying needs of the people broke down the feeble dykes set up by the states. It was action by the National Government, or ruin. In such a situation as this, should a narrow construction be placed on the constitutional provision to tax for the public welfare, or should a construction be placed thereon which will enable the United States to continue as a Government "of the People, by the People, and for the People"? It must be remembered that the Constitution of the United States is a contract of the People by which they have consented to be governed. Did the People intend to have that contract one of such a nature that when emergencies should arise, it would be totally unfit to cope with them - that it would be a hindrance - an obstacle - instead of an aid? Such a contention does not make sense. Should the Supreme Court, in the face of the conditions which have existed for the past few years, be ruled by precedents set down years ago, when the conditions then existing were totally unlike the conditions of the present day - conditions which, fifty or a hundred years ago, could not possibly have been foreseen, except by the Diety? Or should the Supreme Court when cases arise before it, settle the controversy by a broad and liberal construction of the Constitution - a construction which will not only be a legitimate one, but one which will be for the best interests of the People, whose contract the Constitution is? There seems to be but one answer to these questions. The Supreme Court should, in its sound discretion

and wisdom, be not bound by antiquated ideas, but should pass on legislation in the light of present-day conditions. The Constitution can be so construed, legitimately. The strength of our Constitution lies in this very fact.

We have seen by the foregoing discussion that in most respects the Agricultural Adjustment Act and the Social Security Act are fundamentally identical. In only one respect do they differ, and this point appears to be vital. The sole difference is that the proceeds of the tax in the Agricultural Adjustment Act were appropriated for a definite purpose; they were 'earmarked,' while in the Social Security Act the proceeds of the tax are gathered into the Treasury at Washington like all other revenue generally. This fact in and of itself should give food for thought. Does this mean that if the tax is planned as it is in the Social Security Act, the Federal Government will be able to legislate for the general welfare, when necessity arises, concerning subjects which formerly were deemed to be exclusively within the province of the states ? If it does, what is going to happen to the states? They exist because of their reserved powers. If these reserved powers are taken from them under the rule as laid down in the Social Security Case, are the states going to become merely geographical subdivisions of the United States, instead of political subdivisions? Is the Federal Government to become the sole governing force? Or will the Supreme Court save to the states their political sovereignty? These questions raised by the decision in the Social Security Case should be of deep interest. Time alone can give the answer.

THOMAS DENNIS NOLAN

FREEDOM OF SPEECH - COMMUNISM - CRIMINAL SYNDICALISM - INSURRECTION

These are times of great change. The effects of the Great Depression have been widespread, and everywhere great changes have been wrought, perhaps the greatest of which is the almost complete reversal in political thought and ideals. In some parts of what is still referred to as the civilized world, democracy is being challenged; in many other parts, it is no more; in all parts it is on the defensive, and everywhere its principles have ceased to be axiomatic. Freedom of speech, the cornerstone of the democratic philosophy, -now the exception rather than the rule in most countries - has become of more than academic interest, and, in the few countries where this right still exists, the challenge pressed by advocates of the philosophy of the totalitarian state has given the question of its desirability a new importance, and the danger of losing the right has transformed it into a live political issue.

Despite the doubts and fears of the anti-New Dealers on the subject, the fact remains that the United States is still ranked among the few remaining democracies of the world, and Americans still enjoy the right to express their opinions freely. The challenge to this right -if there is one - has not yet reached the point where fundamentals, such as the desirability of continuing this right, are being questioned. Even the numerically few and insignificant adherents of the totalitarian philosophies realize the utter futility of attempting to convince Americans that they ought to relinquish the liberty which centuries of struggle have ingrained in the Anglo-Saxon tradition, and in their efforts to gain converts, even they pay lip service to "Americanism." The situation with respect to freedom of speech in the United States is substantially the same today as it has always been; the question is not, shall we have this right? but rather, how far does it extend? In other words, the question is still of a judicial, rather than political, nature.

In the United States the question in its political aspect was settled with the adoption of the First Amendment to the Constitution, which guarantees that "Congress shall make no law....abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Though this Amendment, like the other Amendments constituting the so-called Bill of Rights, applies only to the Federal Government, the same restriction on power of government to interfere with this right was imposed on the states by the Fourteenth Amendment freedom of speech beingwithin the purview of the requirement that no state shall "deprive any person of...liberty...without due process of law." It was early decided that this apparently unrestricted right had its limitations - that the Amendment was not intended to sanction license, but was intended only to protect liberty. The Constitution of the State of New York specifically makes this distinction: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." (Art.I,§8) And it is within the field of license that the law of libel - both civil and criminal - has its application.

With the scope of the Constitutional guaranty settled, the question became one of drawing the distinction between liberty and license and of classifying particular states of fact under these categories. Though the courts do not attempt to settle political questions, one class of cases which constantly keeps coming up, has an indirect

political significance. The cases involve the right of persons to advocate a change in the form of government, and they raise the question of how far criticism and agitation can go before the State, exercising its inherent right of self-preservation, can impose restrictions on such activities. The question may also be stated in another form: how far can the State go in restricting the right to advocate a change in the form of government? There has been much judicial opinion on this question, and the general principles of law governing what is, and what is not, within the constitutional protection of the First and Fourteenth Amendments are well settled. The general rule is, the Constitution protects the right to advocate overthrow of the Government by peaceful means only; it does not protect anyone who advocates overthrow by violence. "The State in the exercise of its police power may punish those who abuse freedom of expression by utterances inimical to public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace." (Gitlow v. N.Y., 268 U.S.652)

Two recent cases dealing with the question involved members of the Communist Party, and the decisions aroused considerable popular discussion and interest. The first of the two cases, De Jonge v. Oregon (57 S.Ct.255), arose under a Criminal Syndicalism Law of the State of Oregon, which defines "Criminal Syndicalism" as "the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." The defendant was convicted of violating the law, though he contended that the law, as applied to him, was unconstitutional. The case went to the United States Supreme Court on a stipulation of facts substantially as follows:

On July 27, 1934, during the maritime strikes on the Pacific Coast there was held in Portland a meeting, which had been advertised by handbills issued by the Communist Party. The purpose, as stated in the handbills, was to protest against illegal raids on workers' halls and homes, and against shooting of strikers by police. Though held under the auspices of the Communist Party, the meeting was open to the public, and only ten to fifteen per cent of the audience were members of the Party. De Jonge, a member of the Party, was a speaker and in his talk, he protested against conditions in the county jail, police brutality during the strike, and numerous other matters. He told the workers that raids on the Communist headquarters, workers' halls, and offices, were staged in order to break the srike by pittin the strikers against the Communist movement. Defendant asked those present to do more work in obtaining members for the Party, and requested all to be present at another meeting the following day. The meeting was conducted in an orderly manner, but was raided, and defendant was arrested.

The defendant moved for an acquittal on the ground that the act as applied to him for merely assisting at a meeting called by the Communist Party, at which nothing unlawful was done, nor advocated, violated the due process clause of the Fourteenth Amendment. The contention was overruled, and the Supreme Court of the State upheld the lower court, stating "the indictment does not charge defendant with teaching or advocating at said meeting...the doctrine of criminal syndicalism or sabotage. What it does charge is that defendant assisted in conducting an assemblage of persons... to-wit, the Communist Party, which said assemblage was unlawfully...advocating..the doctrine of criminal syndicalism." In other words, the State Court interprete

the indictment not as charging that defendant did anything unlawful at the meeting, but as charging that the Communist Party was advocating sabotage in Multnomah County. This is tantamount to saying that De Jonge's crime consisted not in anything that he himself had done or said at the meeting, but in his participating in a meeting called by a party which outside of that meeting was advocating criminal syndicalism. "In this view," says the United States Supreme Court, "lack of sufficient evidence as to illegal advocacy or action at the meeting became immaterial. Having limited the charge to defendant's participation in a meeting called by the Communist Party, the State Court sustained the conviction upon that basis regardless of what was said or done at the meeting." (p.259). After pointing out the failure of evidence to disclose any activity on defendant's part which violated the State law, Chief Justice Hughes says De Jonge's "sole offense as charged...was that he assisted in the conduct of a public meeting, albeit otherwise lawful, which was under the auspices of the Communist Party." That is, the law as interpreted by the State court condemned an act in itself innocent; for "however innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting was held by the Communist Party. Peaceable assembly for lawful discussion cannot be made a crime, and those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question....is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether the utterances transcend the bounds of the freedom of speech which the Constitution protects." The conviction was unanimously reversed.

In the second case, Herndon v. Lowry,(57 S.Ct.732), the defendant a Negro Communist organizer, was convicted under a Georgia insurrection law. He was indicted for an attempt to incite insurrection by calling and attending public meetings for the purpose of organizing and establishing local branches of the Communist Party. "Any attempt states the section under which defendant was convicted, "by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incide insurrection." This section makes no reference to force or violence, but the State Court, imported from the similar phraseology in the preceding section of the law, the additional element of force as an essential element of the crime. "Force must have been contemplated," says the court, but it would not be necessary "that an insurrection should follow instantly or at any given time, but....it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

The evidence against the defendant consisted of admissions made to police and of certain documents found in his possession. It showed that Herndon was a member of the Communist Party and had been sent as a paid organizer to Atlanta, Georgia, His duties were to call meetings, to dissiminate information respecting the party,to distribute literature, to secure members, and to work up a subordinate organization of the Party. He called and conducted three such meetings.

The chief reliance of the prosecution, however, was on the evidence consisting of newspapers, pamphlets, periodicals, and other

documents found in defendant's possession. Some of this was perfectly harmless, dealing as it did, solely, with unemployment relief in the County, and appealing to the White and Negro unemployed to organize and represent the need for further County aid. None of the specific aims for which members were urged to vote Commuuist was criminal on its face. They included "unemployment insurance,"-"against Hoover's wage-cutting policy," - "emergency relief for poor farmers," and "equal rights for Negroes and self-determination for the Black Belt." The state produced a resolution of the Communist International showing the meaning of the last slogan to include "confiscation of landed property of White landowners and capitalists for the benefit of Negro farmers," and the bringing together "into one governmental unit all the districts of the South where the majority of the settled population consists of Negroes." The resolution refers to the concentration of all governmental power in a minority consisting of "bourgeoisi and landlords" and then declares that "the overthrow of this class in the Black Belt is unconditionally necessary in the struggle for the Negroes' right to self-determination." There are also references to to the "revolutionary trade unions in the South," - "revolutionary struggle against the ruling White bourgeoisie," and "revolutionary program of the Communist Party." Defendant was convicted and on appeal to the Supreme Court of Georgia the verdict was sustained, the court, after interpreting the crime to include the element of force, declaring "under the statute as thus interpreted.....the evidence was sufficient to authorize the conviction."

The United States Supreme Court, after sifting the evidence in the case, said, "there is no evidence the appellant (defendant) distributed any writings or printed matter found in the box he carried when arrested or any other advocating forcible subversion of governmental authority. There is no evidence the appellaht advocated, by speech or written word, at meetings or elsewhere, any doctrine or action implying such forcible subversion. There is evidence....that the appellant held meetings for the prupose of recruiting members of the Communist Party....and there is proof of the doctrines which that party espouses. Appellant's intent to incite insurrection.....must rest on his procuring members for the Communist Party and his possession of that party's literature."

The Court quotes from the Gitlow case (supra) to distinguish it from the case at bar. In that case, the Court points out, the New York Legislature had determined that utterances of a certain kind involved danger of substantive evil. Therefore the question of whether any specific utterance within the prohibited class was likely to bring about the substantive evil, was not open to consideration. Here, the question is entirely different. The statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself. Therefore the Court may consider the question of whether the specific language used involved "such liklihood of bringing about the substantive evil as to deprive it of the Constitutional protection." That is, since the Legislature, in this case, had not decided that a certain class of utterances involve danger, the Court could inquire whether or not a specific utterance did involve such danger. Though this distinction was drawn in the Gitlow case (supra), the importance of the Herndon case lies in the fact that what was said in the former was merely by way of explanation whereas in the latter the distinction was first applied, and constitutes a limitation on the "dangerous tendency" doctrine. The decision here, specifically holds that "under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor" the dangerous tendency of his words may not be made the standard of his guilt.

After referring to the constitutional right to address meetings and organize parties, and after restating the principle announced in the De Jonge case (supra) the Court says "the crucial question is not in the formal interpretation of the statute by the Supreme Court of Georgia but the application given it." As applied to defendant "the offense made criminal is that of soliciting members for a political party....when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government." Stressing the absence of proof that defendant brought to the notice of newly recruited members any unlawful aims of the Communist Party, the Court holds that merely inducing others to become members and to agree to abide by the tenets of the Party, under these circumstances reveals nothing to indicate that he incited to insurrection. The only objectives that defendant was proved to have urged were those having to do with unemployment and emergency relief, which are "void of criminality." And as for the books and pamphlets found in his possession, he had only one copy of the one claimed to be objectionable; that copy he retained. "In these circumstances, to make membership in the Party and solicitation of members a criminal offense...is an unwarranted invasion of the right of freedom of speech."

The test of guilt formulated by the State court was held vague and uncertain because it prescribed that it would be sufficient if the accused intends that an insurrection "should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." To be guilty under the law as thus construed, a defendant need not advocate resort to force. "It would be sufficient," says Justice Roberts, "if the jury thought he reasonably might foretell that those he persuaded to join a party might at some indefinite future time, resort to forcible resistance of the Government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action." The law forbids no specific or definite acts. Quoting the Cohen Grocery case (255 U.S.81) the opinion continues "it confines the subject of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides." Since no reasonable ascertainable standard of guilt is prescribed, and since the boundaries set to freedom of speech are so vague and indefinite, the law "as applied and construed necessarily violates....the Fourteenth Amendment."

This was a five-to-four decision, and the dissenting opinion was delivered by Justice Van Devanter. He was of the opinion that there was evidence from which distribution of the pamphlets and other documents found in defendant's possession could reasonably be inferred. The fact that the defendant was a member of the Party, and was a paid organizer; the fact that he had received the literature for distribution in the course of his work, and had copies of it under his arm when he was arrested; the fact that he had been securing members, which was part of the work in which the literature was to be used, all "tended strongly to show not only that he understood the Party program as outlined in the literature, but also that he brought them to the attention of others whom he secured as members." When it is recalled that the majority laid great emphasis on the lack of proof that defendant had advocated or communicated to the audiences at his meetings the unlawful aims of the Communist Party, as revealed by its publications, the point of departure between the majority and the minority will be seen to lie in the effect and interpretation of the evidence in the case. The minority also disagrees on the ques-

tion of the definiteness of the standard of guilt prescribed, saying "the words 'might reasonably expect' have as much precision as is admissible in such a matter, are not difficult to understand, and conform to decisions heretofore given by this Court in respect of related questions."

When announced, the decisions were hailed throughout the whole country, because they lent support to the argument of the opponents of the President's Court reform bill that the Supreme Court was still the guardian of the liberties of the people, and it was generally believed that the laws of Georgia and of Oregon had been declared unconstitutional. As a matter of fact, though the Court decided that each of the defendants had been deprived of his constitutional right of free speech, yet the decisions did not invalidate the two laws involved. A careful reading of the opinions will disclose that the Court took pains to point out the limited scope of each decision. Again and again throughout the whole opinion, recur phrases like "the statute as construed and applied in defendant's trial," - "the proof wholly fails to show," and "in these circumstances." Each case was really decided on the question of the sufficiency or the insufficienc of the evidence. In each case, the law as interpreted by the State court was deemed valid, and was invalidated only in its application. Even though the Herndon case held the standard of guilt too vague and indefinite, the Court was careful to limit this conclusion to the particular facts involved. In other words, in both cases the laws were declared unconstitutional only insofar as applied to the state of facts presented. This is more apparent in the Herndon case than in its predecessor; the minority was willing to infer that the literature had been distributed by the defendant; the majority was not willing to do so. T he deciding factor was only a matter of degree.

To say this, however, is only to point to what is true of the whole field of constitutional law. The important thing to remember is that the Herndon case limited the "dangerous tendency" doctrine, and that both cases declared that in order to convict a man of a crime, his own acts -not his relation to an organization - must form the basis of his guilt.

JOSEPH WOOLMAN

CONFLICT OF LAWS - PUBLIC POLICY CONTROLS THE LAW

Holzer, a German Jew, was employed by the Deutsche Reichsbahn Gesellschaft, a German corporation, under a three-year contract as general executive manager. The contract contained the usual salary provisions and it was also agreed that "in the event Holzer should... ...become unable, without fault on his part, to serve during the perio of the contract, the Reichsbahn would pay to him....120,000 marks, in discharge of their obligation under the hiring." Holzer was discharged on the sole ground that he was a Jew. He now alleges due performance on his part and asks damages of $50,000; and also, because of the policy of the German Government in banishing Jews from certain positions, Holzer claims he was prevented, without any fault of his own, from continuing his services to the Reichsbahn and therefore should receive the 120,000 marks before mentioned. The case has been before the court on three different motions: two, by the defendant, to vacate the attachment of corporate property in this State (Holzer v. Deutsche Reichsbahn-Gesellschaft, (160 Misc.487; id at p.597) - both motions denied; the third, by the plaintiff, to strike out the defense under Subd.6 of Rule 109 of the Rules of Civil Practice (159 Misc.830) It is the consideration of the defenses, under the latter motion, which we shall discuss.

The answer of the Reichsbahn asserts three separate defenses. The first contends that the defendant's property has the status of State property of the Government of Germany, and as such, is entitled to all the rights, and privileges, and immunities, of sovereignty. The second defense pleads that the contract "was made and was to be performed in Germany and was terminated in Germany, and was and is governed by the laws of Germany." For the third separate defense an accord and satisfaction is alleged.

(1)"Must discharge of the contract, pursuant to German law, be honored here?" (id.Collins, J. at p.835). This was the major question presented by the motion to strike out the defense.

The contract was made, executed, and to be performed, in Germany. It was terminated there by the Government. Holzer is now a resident of New York,and would have our courts give him relief according to our laws.

"The duty for the performance of which a party to a contract is bould will be discharged by compliance with the law of the place of performance of the promise with respect to: (a) the manner of performance;..... (d) the sufficiency of performance;.... (e) excuse for non-performance." (Restatement, Conflict of Laws, §358). Comment from this source also relates that the law of the place of performance determines the manner and the method, as well as the legality, of the acts required for performance (id.) In the same vein is the rule laid down with regard to illegality of performance (id., at §360).

It is generally said that, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (Underhill v. Hernandez, 168 U.S.250), but, "There is, however, a well-established exception to the rule to the effect that a state will not enforce a contract though valid where made if its enforcement is contrary to the policy of the forum." (Straus & Co. v. Canadian Pacific Ry.Co., 254 N.Y.407; People v. Martin, 175 N.Y.315; Williston on Contracts Vol.3 §1792)

"When we speak of the public policy of the State, we mean the law of the State, whether found in the Constitution, the statutes, or judicial records." (People v. Hawkins, 157 N.Y. 265). There can be no doubt that the policy of the German Government in question is contrary to our public policy. But the situation presented does not require that we enforce a contract "valid where made" (Straus & Co. v. Canadian Pacific Ry. Co., supra); rather, our courts are, in effect, asked to validate as far as possible a contract now invalid where made. In other words, does the converse situation apply? Particularly in a case where no part of the performance is here?

The application of our law is sought to be justified by reference to marriage and divorce cases in which our own public policy prevailed over that of a foreign or sister state (Atherton v. Atherton, 181 U.S.155; Haddock v. Haddock, 201 U.S.562; Thompson v. Thompson, 262 U.S.551; Berney v. Adriance, 157 A.D.628; Kaiser v. Kaiser, 192 A.D.400, af'd without opinion 233 N.Y.524). The analogy does not seem to be a good one. In such cases it is generally found that one of the disputed marriages or divorces was within the state in which the contesting action was brought. Or at least that one of the parties "was a citizen of this state....at the time of the action in a foreign state." (Kaiser v. Kaiser, ante.) Further, "The contract of marriage is something more than a mere civil agreement between the parties, the existence of which affects only themselves." (Barker v. Barker, 151 Supp.811). "It is a status, which involves the welfare of the public." (Levy v. Levy, 150 Supp.610). Protecting the welfar of the public within our State is not strictly the same as applying our public policy to a contract the performance of which was to be undertaken outside of the State, but was prevented because the government there had a contrary policy."

The case of Lemmon v. People, 29 N.Y.562, is relied upon and is considered "illuminating" here. (Holzer v. Reichsbahn, at p.839). It involved a New York statute which declared that every person held as a slave "who hath been introduced or brought in this State contrary to the laws in force at the time, shall be free." (Laws of 1817, Ch.137 §§9, 15; Revised Laws of 1830). The appellant was taking her slaves from one slave state to another, and stopped in New York on the way. Her slaves were freed. Slavery was a valid status of Virginia, which the court would not allow to carry over into our State, because we had made the status invalid here. In the Holzer case there is no attempt to enforce in our State a contract that is valid in Germany. On the contrary, there is an attempt to make valid here, a contract not valid there. There is no true parallel in the two cases.

From the discussion so far, no justification for an application of our law to the facts of the Holzer case is found. Actions involving decrees and orders for the Soviet Government, both before and after that Government was recognized by the United States Government, have frequently been before our courts. They are very instructive in a consideration of the case at hand.

Dougherty v. Equitable Life Assurance Society, 266 N.Y.71, is cited to support both sides of the present controversy. Therein the plaintiffs, who were representing Russian citizens, were suing upon contracts which had been made in Russia before the Revolution, and which were expressly to be "settled according to Russian laws and in Russian courts of justice." Subsequent to the Revolution, the Government issued decrees subjecting all private companies to complete liquidation, cancelling all contracts of life insurance, and seizing

the assets of the defendant in Russia. The plaintiffs were not allowed to recover on the policies so cancelled when relief was sought in this State. "The right to collect money by a Russian citizen on a contract to be interpreted according to Russian law is no different from the right to tangible property in Russia or the possessions thereof. Both rights are dependent on the law of Russia." (ante., Crane, J. at pp.87, 88). On the facts, and from the law as declared by the decision, the plaintiff Holzer, evidently is in a similar position and cannot appeal to our courts. But he turns to dictum in the case; "Recognition does not compel our courts to give effect to foreign laws if they are contrary to our public policy." (id. at p.90). This is declared to be "The capital point of that holding" (Holzer v. Reichsbahn, 159 Misc. at p.837) in connection with the present case, but it was not the point in issue in the Dougherty case, and cannot be credited with much weight here.

The same court has stated that an action against the de facto Russian Government for confiscation of a quantity of furs stored in that country cannot be brought here under an attachment of property in this State. (Wulfsohn v. Russian Republic, 234 N.Y.372). We are not considering the claims of the Reichsbahn to sovereignty under this defense, but the governmental acts of a foreign government are being considered insofar as they affect the contract in question. Of such acts it is said, "It may be conceded that its (the foreign government's) action should accord with natural justice and equity. If they do not, however, our courts are not competent to review them." (id.) The acts of confiscation by the de facto Russian Government were against our public policy. (U.S.Constitution, V and XIV Amends. N.Y.Constitution, Art.1 §6). "Just compensation is provided for by the Constitution, and the right to it cannot be taken away...." in the United States. (Seaboard Air Line Col v. United States, 261 U.S. 299, and many others). So far as the Wulfsohn case is applicable to the Holzer case, it would seem to hold that whether or not the foreign government acted contrary to our public policy, made no difference - we could not take jurisdiction of matters under the control of that government.

In another case it appeared that the Soviet Government confiscated oil lands and sold oil extracted therefrom, to the Standard Oil Company. The former owners, contending that this was but the act of a band of thieves, sued to recover the proceeds, on the ground that no title had passed to the purchaser of the oil. (Salimoff & Co. v. Standard Oil Co., 262 N.Y.220). Despite the fact that the Soviet Government was regarded as only de facto at the time, the complaint was dismissed as insufficient in law. The courts of one independent government will not sit in judgment upon the validity of the acts of another, done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries." (id. at p.224).

The causes that present the strongest argument in favor of the applicability of our law in actions such as this are, Vladikavkazsky RylCo. v. N.Y.Trust Co., 263 N.Y.369, and James & Co. v. Second Russian Ins.Co., 239 N.Y.248.

In the Vladikavkazsky case, the property of a railroad corporation in Russia had been confiscated by a former government. The Soviet Government, in power now, and also at the time of the bringing of the action, had no interest in the controversy. A deposit in the defendant bank, belonging to the railroad corporation, had escaped the confiscation by the old government. The corporation was allowed to

recover the deposit by resort to our courts. "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confisca tion of its assets, and the repudiation of its obligations by decrees, is contrary to our public policy, and shocking to our sense of justice and equity. That the confiscation decree in question - clearly contrary to our public policy - was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts." (Vladikavskazsky Ry.Co. v. N.Y.Trust Co., ante). The case would be exactly in point were it not for the very practical difference in the standing of the government against which the charges were made. The government whose acts were challenged in the Russian case was one no longer in power. The German Government very definitely is. Would the court have gone so far if the Soviet Government had been the one challenged?

The closest answer to that question is found in James & Co. v Second Russian Ins.Co., 239 N.Y.248. The Soviet Government is in power in this case, but is recognized only as a government de facto, the United States Government not yet having accorded full recognition. The Soviet nationalized the business of insurance companies in Russia and the companies, by governmental decree, were released from the payment of debts and liabilities. The plaintiff's assignor had been insured by the defendant company, one of those which came under the Soviet decree. The plaintiff attached assets on the defendant in New York State, and would enforce the contract liabilities out of those assets The action was allowed. "Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum." (id. Cordozo,J. at p.257.) Clearly this statement should be definite authority for a finding that our courts will deal with such cases. Unfortunately the remarks are qualified. "So long at least as the decree of the Russian government is denied recognition as an utterance of sovereignty, the problem before is is governe not by any technical rules, but by the largest considerations of public policy and justice.... We keep our ruling within these limits." (id. at p.256)

After reading these cases, the conclusion is inevitable that non of them has had to go so far as a holding in favor of the right to disregard the German decrees in the Holzer case, would necessitate. As was pointed out earlier, it is well established that our State will not enforce a contract "though valid where made if its enforcement is contrary to the law of the forum." (Straus & Co. v. Canadian Pacif Ry.Co., supra). When, as in the Holzer case, they are asked to enforc the remedies of a party to a contract that has been invalidated where made, our highest court has strongly implied that it will not deny the remedy if it is "contrary to our public policy and shocking to our sense of justice and equity," (Vladikavkazsky case) and, "assets of the debtor were available for seizure in the jurisdiction of the forum." (James & Col v. Second Russian Ins.Co., supra.) The dictum of the judges of the Court of Appeals definitely points the way for the lower court holding in the Holzer case. It is decided that the German decrees are not binding in our courts. "The answer resides in our own law, not that of Germany." (Holzer v. Reichsbahn, at p.837).

The policy which our courts have adopted is not beyond criticism. Our natural sympathies are with the plaintiff in cases of this type. He has been deprived of rights of citizenship for reasons, and upon principles, which are not recognized in this country. If he fails to get relief in our courts he will probably be without a remedy. But

should the defendant be penalized? He, too, is under the control of the same governmental decrees. He has had no hand in the destruction of the contract. In some of these cases his property, except that remaining in foreign countries, has been confiscated. There is little justification for our courts to step in, say that they will recognize the contract, and make the defendant uphold his part of the obligation The very reason for his contesting the plaintiff's rights is sufficient answer. He, the defendant, has been subjected to the law of his land, and the plaintiff should be made to bear the same burden. After all, the contract was to be performed in their land. Since that is impossible, through no fault of either party, both must suffer. And the fact that the law destroying the contract is against our public policy has no bearing on the matter. The attempt to enforce our own policy on a contract what was to be performed in Germany, is only searching for trouble.

The other two defenses in the Holzer case were dealt with briefly but are interesting to consider.

(2) Accord and satisfaction. Under the allegations of this defense it was declared that by decrees and laws of the German Government the retirement of certain classes of non-Aryan descent was ordered and further performance of the contract of employment was prohibited, except that there was permitted to be paid to the plaintiff the sum of 10,000 marks per month for the remainder of the term of contract. It is said that the plaintiff, in accepting these sums, has entered into accord and satisfaction, and has been duly paid in full.

The court holds that this defense is legally insufficient. This seems too evident for dispute. "An accord is a contract....between creditor and debtor for the settlement of the claim by some performance other than that which is due." (Restatement of the Law of Contracts, §417a). The power of the government to prohibit the performance of the contract is not in issue. But to excuse the defendant on the ground alleged would be to justify the result by the use of an inappropriate means. "The plaintiff was abjectly helpless....Mutuality must be averred." (Holzer v. Reichsbahn, at p.835)

(3) Sovergign immunity. "This defense is the most serious of the three" but, "whether or not the action is really against the German Government will be left to the trial." (Holzer case, at pp.844, 845)

The plaintiff contends, "that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takesthat of a private citizen." (Bank of the U.S. v. Planters Bank of Ga., Marshall Ch. J., 9 Wheat.904).

The defendant asserts that the treaty between the United States and Germany, restoring friendly relations, proclaimed November 14, 1921, incorporated therein an article of the treaty of Versailles,and which treaty excepts sovereign immunity only "If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty." (Treaty of Versailles, Ch.V Part X Art.281) And the defense proceeds to allege that it is not a trading company nor commercial enterprise, and is not engaged in international trade, but is an instrumentality of the German Government operating the Governmental railroad system of that country.

"The trial will disclose the true activities of the defendants and reveal whether they are engaged in international trade within the

meaning of the treaty granting sovereign immunity. Of course if the suit is actually against the German Government, or against a branch of that Government,....the suit must fail." (Holzer v. Heichsbahn, ante)

That the pleadings did not, as a matter of law, show that the defendants were entitled to sovereign immunity, was also found by McCook, J. (Holzer v. Deutshe Reichsbahn Gesellschaft, 160 Misc.597) under a motion by the defendants to vacate the attachment of their property in this State.

FRANK SEYMOUR HIGGINS

QUESTIONS AND ANSWERS DEPARTMENT

The following questions are taken from cases presented in this issue, and from other cases of interest. All legal topics are included, and present a fair method by which you can test your own legal knowledge or that of others. Compare your answers with those given on page 39 of this issue.

1. A sues B for divorce in this State. Prior to this action, A had obtained a Mexican divorce. Neither party ever went to Mexico, but defendant appeared in Mexican court by written consent, and submitted to its jurisdiction. The marital status of the parties was in this State at all times. Is the defendant B entitled to an order dismissing the complaint?

2. A State law makes it a crime to incite violence and breach of the public peace. Defendant is accused of violating this law. He is a college professor, and the basis of the charge is, that in class he explained the anarchist doctrine that ultimate resort to violence is necessary to change the social order. Should he be convicted?

3. Is the tax imposed on employers by Title IX of the Social Security Act of August 14, 1935 (49 Stat.of L.620 ch.7(Supp)1), the proceeds of which are not earmarked for any specific purpose, but are paid into the general fund of the Treasury, by reason of its provisions for crediting the employer up to 90% of the tax, with contributions made to a state unemployment fund under state law, void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in the federal form of government?

4. A is employed in B Flour Mill from 1928 to May, 1931. Through B's negligence in failing to provide adequate protective devices, A contracted silicosis. A brings an action inMarch, 1934, for damages. (I) Is the action maintainable? (II) If so, what damages may A recover?

5. B, a building superintendent, found that a steam pressure valve was off, and the boilerroom was filled with steam. While remedying this condition, he sustained a chill, resulting in pneumonia, which was the immediate cause of his death. Was his widow entitled to death benefits under the Workmen's Compensation Law?

6. Where a system of parking meters is installed on a street, could an abutting property-owner claim that it impairs his constitutional rights?

7. A contract of employment is made in Germany, is to be entirely performed there, and the parties are German residents. German laws are then passed which deprive A, one of the parties, of his rights. He establishes residence here, attaches property in this State belonging to B, the other party, and sues on the contract. Can our courst refuse to recognize the German law because it is contrary to our public policy?

EVIDENCE - RES GESTAE

DECLARATION OF THE INTESTATE AFTER THE ACCIDENT

The problem of the admissibility of statements as part of the res gestae has again come into controversy in the case of Handel v. New York Rapid Transit Corp., 252 A.D.142. The facts briefly stated are as follows: Witness Downing testified that he saw the deceased go up the stairs of defendant's elevated railroad at the West Eighth Street station and heard the train approaching. Another witness, Mrs. Pfeifer, testified that she lived at West Third Street and that she heard screaming. Looking out of the window, she saw a train come to a stop and something that looked like "a big bundle" fall from the side door of the last car to the street below. She testified that she rused from the house to the place where the deceased fell. The man, who was plaintiff's intestate, said, "Save me. Help me. Why did that conductor close the door on me?" The question presented is the admissibility of the evidence, the deceased's utterance being necessary for the plaintiff to make out a prima facie case.

The majority of the court - three justices - were of the opinion that the statement was hearsay, being narrative of a past event and thus not within the res gestae rule. To sustain their decision they cite four cases: Valdele v. N.Y.C.H.R.R.Co., 95 N.Y.274; Martin v. N.Y.N.H.& H.R.R.R.Co., 103 N.Y.626; Greener v. General Electric Co., 209 N.Y.133; Hill v. Erie Railroad Co., 221 A.D.518. Let us look for a moment at these cases.

In the Valdele case, the deceased, a deafmute, had been run down by a train and fatally injured. No one saw the accident. About thirty minutes later he made a statement in sign language to his brother, also a deafmute. At the trial the brother was allowed to quote the deceased as follows: "John said there was a long train and that he was struck by the engine that followed it." This statement was held to be inadmissible. The court said, "The res gestae, generally speaking, was the accident, so it was error to admit these statements since they were not made at the time of the act nor so nearly contemporaneous as to characterize it. They were purely narrative, giving an account of the completed transaction. They quoted from Lund v. Tyngsborough, 9 Cush.36, to the effect that the act and the statement must be so connected as to constitute one transaction.

In the Martin case, when asked sometime after the accident, how it happened, the deceased gave a reply which was held inadmissible also on the ground of hearsay.

The majority finds its greatest support in the Greener case. Deceased fell from a ladder and when a fellow-workman asked how it happened, the deceased replied, "My feet is broke, the ladder bent back." The court said the statment must be spontaneous so as to exclude the idea of fabrication. They said the answer was narrative and was the result of a question.

The majority did not discuss the case of People v. Del Vermo, 192 N.Y.470. There the deceased, the defendant, and the witness were walking along the street and the deceased took a few steps

forward, and fell. The witness asked him what was the matter, and he answered: Del Vermo stabbed me with a knife." The court held that this was a spontaneous expression, made under circumstances which precluded fabrication. It was held that they were in such a connection with the main transaction as to form a part of, and illustrate the principal fact. It was the impulsive and distinctive outcome of the act and need not be strictly contemppraneous with it.

Thus it appears that the modern rule is more liberal. The evidence need not be of a fact happening at the very same time as the main fact in issue. If the statement is spontaneous it is admissible if narrative, it will be excluded. The Greener case (supra) did not destroy the rule set up by the Del Vermo case, but rather said that the statement was a result of forethought. In short, the distinction was a factual one.

To my mind, the cases of Del Vermo and Greener are indistinguishable on their facts. This is the view expressed in Hill v. Erie RR. (supra). Both statements are made immediately after the happening of the event and both were in response to an inquiry.

Thus in every case concerning the res gestae we must ask ourselves two questions: (1) Was the statement "spontaneously expressive of the injured person's observation of the occurence?" (2) Was it made within "such a time as to preclude fabrication?" Inquiring thus, it is evident that the difficulty is factual and it is because of this that the cases are seemingly at odds.

Applying the questions to thepresent situation, it seems to us, that the dissenting opinion is the more logical. Surely it cannot be contended that while a man is struggling to save his life while swinging helplessly from an elevated train, his mind is preoccupied with placing the blame on the railroad. As Justice Close wrote for the minority, "On a journey so perilous, one has little time for plotting fiction."

It follows that the interval in which the planning must have been done was the two and one-half minutes he lay on the street until Mrs. Pfeifer found him. True, the period might well be long enough to concoct a story. For that matter, five seconds might be long enough to invent a very logical excuse. But the question, to my mind, is not whether he had time to plan, but rather was planning the act of a reasonable man under the circumstances. Here there was no response to a question,as in the Greener case, but rather a spontaneous utterance characterized by the words, "Save me. Help me. A doctor's testimony showed that the deceased suffered besides numerous lacerations and concussions, a concussion of the brain, a broken right hand, a fracture of the right femur, a broken pelvis and a ruptured bladder. What reasonable man under this pain and shock would be thinking of a plan to cheat the railroad?

It may well be that the majority of the court, looking at the practical side of the subject, believe a line of demarcation must somewhere be drawn. But, conceding it is a matter of degree, all such questions, I believe, must be decided with a view to the surrounding circumstances. If, as here, the circumstances preclude the idea of fabrication, and indicate spontaniety, it seems to me, the court should allow the admission of the evidence.

HARRY STEPHEN CHRISTENSON, JR.

SILICOSIS - STATUTE OF LIMITATION

The United States Court of Appeals, Second Circuit, in the case, Pieczonka v. Pullman Co., 89 Fed.(2d) 353, discusses the New York three-year Statute of Limitations for personal injuries caused by negligence, and its applicability to silicosis caused by breathing in silica dust. It was an action to recover for the death of the plaintiff's intestate due to silicosis contracted while employed as a sand-blaster by the defendant Pullman Company. Sand-blasting is driving sand at high speed by compressed air through the nozzle of a hose, out of which it comes in a cloud or fog, which envelops the head of the operator. Unless protected, he must breathe in this dust, and in time he contracts a disease of the lungs known as silicosis, which is incurable, and if continued, is fatal. The deceased's duties consisted of removing old paint by the sandblast from defendant's cars in the yard, in Buffalo, which were in the process of being renovated. The deceased entered the defendant's employ in 1913 and remained until September 12, 1931. During these hears he was always given the best known protective masks to wear. He repeatedly refused to use them as directed.

Not quite a year after he left the defendant's employ,-on July 5, 1932 - he began an action for personal injuries. When he died in April, 1933, the plaintiff was appointed his administratrix. She commenced this action in February, 1934. The judge charged the jury that if the deceased had contracted silicosis before July 5, 1929, the plaintiff could not recover, though there was evidence that the continued breathing of sand between July 5, 1929, and September 12, 1931, might have accelerated his death. If the deceased had allowed the Statute to run against any suit which he could have brought to recover for his personal injuries, his administratrix is barred upon his death. A corallary to this proposition is that if the action be pending upon his death, his administratrix may file an action of her own. The deceased's action commenced July 5, 1932, was within three years of his leaving the defendant's employ; if it was not too late, neither was the action at the bar.

Schmidt v. Merchants Despatch Transport Co., (270 N.Y.287) held that in silicosis cases, the limitation begins to run from date of breathing dust, and not from development of silicosis, and workmen must recover in one suit for all injuries which have resulted or may result from his exposure, though they have not yet appeared.

Circuit Judge L.Hand, writing the opinion in the Pieczonka case, said "it (Schmidt case) did not hold, however, that an action would not lie for injuries due to the last three years' exposure, because recovery was barred for all earlier periods. The employer got no prescriptive right to contaminate his workmen's lungs. Therefore the deceased could recover at least for the period between July 5, 1929, and September 12, 1931, or for any aggravation of the malady although already contracted. Similarly, the plaintiff did not lose her right to recover for any loss due to his death, even though his lungs had been so far invaded on July 5, 1929, that he would have died of silicosis anyway. If because of his work during that period, he died sooner than he would otherwise have done, that caused a legal injury to her for which she could recover. Her damages are limited to that loss and she must prove how much life was shortened because of injuries sustained during the only period for which he could himself have recovered."

The New York rule is that the Statute begins to run from the date of breathing the dust. An action, however, is maintainable for three years after leaving the employment. But in an action brought two years and eleven months after leaving the employment, damages would be limited to those that could be proved to have accrued during the last month of employment. This rule is defended in the Schmidt case (supra) on the ground that the injury was complete when the alleged negligence of defendant caused plaintiff to inhale the deleterious dust. The Statute of Limitations is one of repose, intended to bar stale claims. The Court admits that it may work a hardship in some cases. The majority of the Appellate Division in the Schmidt case (244 A.D.606) held causation does not start with the damage. It commences with the wrongful act, else there is no liability. The cause of action arises at the moment of commission of the act constituting the wrong. The gist of the action is negligence, and not the consequent injury resulting therefrom.

To me the rule propounded in the dissent seems more just and fai: They argue "that in an action for negligence damage is the very gist and essence of the plaintiff's cause. Inhalation of silica dust does not always or necessarily produce silicosis. Development is insidious and uncertain. Statutes of Limitation, especially short statutes are drastic. They serve a good purpose when properly applied. But care should be taken that their scope be not extended to bring about injustice. Causation is not required to wait on discovery by plaintiff. But not until disease has taken hold of a plaintiff to his damage is there causation such that the statute begins to run. Injury is no more likely to result if the statute does not begin to run until actual damage has accrued, than if the employees are compelled to bring lawsuits at the moment they become exposed to disease or suffering, when they have no reason to expect such a development and the fact may be that injury will result -if at all- only when a substantial period of time has elapsed after exposure."

In some jurisdictions for occupational disease the time does not begin to run until the plaintiff knows, or should know, that he has the disease, either during the period of employment or at any time after the employment ended. In Marsh v. Industrial Accident Commission, 18 Pac.(2d)933, the Supreme Court of California held "that the injury dates from the time when the diseased condition culminates in an incapacity for work. For until then the workman has received no injury in a legal sense. In case of latent and progressive disease, such as pneumoconiosis, it cannot be reasonably said that the injury dates necessarily from the last day of exposure to the dust-laden atmosphere and that the presumptive period begins to run from that date. Rather, according to our view, should the date of injury be deemed the time when the accumulated effect culminated in a disabilit traceable to a latent disease as the primary cause and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of employment."

I think that our Statute of Limitation, set out in §49 of the Civil Practice Act, providing for a three-year period in case of injuries sustained through negligence should be modified in accordance with this view, and a statute similar to the one governing cases of fraud, be enacted. This would not work any great hardship on the employers who have the opportunity and the means of discovering the disease by periodical inspections. A great hardship is worked now on the worker who does not have this opportunity of discovery. A

modification of our present Statute of Limitations is necessary in order that we can justly say that the employer has no prescriptive right to contaminate his workmen's lungs.

JOSEPH DORMER STEPHEN

PARKING METERS - AS AFFECTING THE PUBLIC AND THE OWNERS OF ABUTTING LAND

"Would the establishment of parking meters for the purpose of collecting fees for the privilege of parking vehicles upon the public highways, infringe any rights of the servient land-owners abutting on the public highways or any rights of the individual members of the public in the use of the public highways, under the State or the Federal Constitution, or both?"

This question was presented to the Supreme Court of Massachusetts when the Legislature sought an advisory opinion as to the validity of a proposed act, "authorizing the purchase, installation, operation, and maintenance of devices known as parking meters, by cities and towns for the purpose of enforcing ordinances, by-laws, orders, rules and regulations relative to the parking of vehicles on public ways, and the establishing of and charging a fee for the privilege of parking vehicles on certain public ways." In Re Opinic of the Justices, Vol.8 (2d) N.E.179, the court expresses its inability to give a categorical answer to this question, because no ordinance had been passed under the statute such as would permit observation of a practical working of the system. But it did propound certain principles which indicate that the proposal is proper.

The parking meter is something new to the law. The general public has a vague knowledge of this innovation in traffic regulation, but it has not become familiar with its technical operation, since the device has been installed for trial in only a few localities. The court is equally unfamiliar with parking meters. It says "We are informed that it consists of a post designed to be set near or inside the curb surmounted by an enclosed mechanism for receiving coin, measuring time, and displaying a conspicuous signal at the expiration of some definite period of minutes, the whole being four or five feet in height. Its main purpose is to aid the police in enforcing regulations governing the parking of automobiles. That end is accomplished by rendering it easy to observe the adjacent automobile which has exceeded the permissible period of parking." (p. 181).

It is common knowledge that traffic regulations affecting the use of public highways are abundant and complex, and often involve the use of mechanical devices. But there must be some limit to the extent of regulation and to the use of these devices. This limit is not determined only by practical considerations of enforcement and operation, but by individual rights, the infringement of which is not justified by the end sought after, and thus is forbidden. The regulation may be valid in its object but its operation may become so arbitrary and confiscatory as to violate constitutional guarantees. Those likely to be injured by the regulation here in question are th abutting property owners and the individuals of the travelling publi

The court states, "the validity of the proposed statute depends in large part upon the rights of the public in public ways..... The public acquire by the location of such (public) ways a right of passage for the purpose of travel over the land taken, with all the

powers and privileges necessarily implied as incidental to the exercise of that right.... With respect to land included within the limits of the public way the public have no other right but that of passing and repassing." (p.181).

"Doubtless temporary and reasonable stops of automobiles on highways are lawful as an incident to travel." (p.182) But "the parking of automobiles has become a considerable problem in the regulation of traffic on highways. Ordinances and by-laws undertaking to govern parking have been widely adopted. Even before the common use of automobiles, ordinances limiting the time during which a vehicle could stop on the public way were adopted and enforced." (p.181). Thus, with respect to the parking of vehicles at a place in a public street where a person has no legal title to the land and no interest in it greater than an easement of travel which is held in common with all citizens, the court asserts the established rule that an ordinance which prohibits parking there impairs no right of any citizen.

In regard to the exaction of fees, the court says, requirements of payments from those parking automobiles to meet the cost of installation, operation, and maintenance of the system and its general supervision would be permissible. It is not necessarily an infringement of the rights of individuals in public ways to charge a small fee for some legitimate special use to defray the cost of the special service afforded. (p.182). The court draws an analogy to tolls for roads, bridges, and tunnels, which are well established as proper exactions from travelers. It is thus apparent that the public at large has little grounds upon which to attack such an exercise of the police power.

But the owner of the abutting land, who generally owns the fee to the roadbed, has a stronger claim of injury. The court distinguishes the abutter who owns the fee to the road from the one who owns only to the edge of the public way. Where the abutter does not own the fee to the road, "he is entitled to reasonable access to the way from his land and to his land from the way," (p.182) but he could make no claim against parking as for trespass upon his property His rights are confined to a reasonable right of passage between his land and the way.

Where the abutter owns the fee, it is established that, "title to the land and all the profits to be derived from it, consistently with and subject to the right-of-way, remain in the owner of the soil... Whatever is done within the limits of the highway by the public or by members of it, not justifiable as incidental to travel, is a violation of the rights of the abutting owner...(p.181). The abutting owner holds title to the fee subject only to the easement of travelers to pass and repass. But this easement of travel is interpreted in a broad sense, and comprises installation of pipes, power poles, fire alarm boxes, hitching posts, traffic lights, signs and similar devices, as well as the obvious easements of passage. All these are permitted because they facilitate the use of public ways for purposes of transportation or passage and promote the safety or comfort of those who travel.

But the court notes, "there is much parking along highways which is in excess of the easement of travel and is a trespass

against the abutting landowner.... An ordinance which allowed such parking as would interfere with reasonable access to his premises by the abutter would be invalid... Regulations cannot be authorized which purport to confer upon individuals rights of occupancy of the highway which in time, space, or otherwise exceed the fair limits of the exercise of the public easement of travel." (p.182).

Thus, the court recognizes the strong rights of the abutting owner which might be infringed by the public's occupation of his property in parking cars, or by the erecting of a device which would be such a physical obstruction as to be beyond inclusion within the broad interpretation given the permitted easement of travel. It also expresses the general principles which indicate that the general public has no complaint against a fee system to hasten the departure of parked cars.

But it feels that whether constitutional rights would be violated will depend upon how the ordinances are drawn. And whether the use of the meters would be confined within the lawful limits of travel, will depend upon how they are actually applied to particular situations. The court realizes that the meter itself might be of such size as not to be a structure permissible under the easement of public travel. It also warns that the plan of using meters cannot be turned into a business for profit over and above the expenses involved, so as to establish a commercial enterprise on the public easement. This would be to divert to alien purposes property taken for public uses and paid for by funds raised by taxation. (p.182).

Because it is merely an advisory opinion on a general statute, this decision leaves much to be answered by actual controversies between parties who will be adversely affected by the proposed installations. But it is interesting as a cautious forerunner of decisions on this topic which must surely follow. And it does well to point out the need for careful drafting of ordinances and a judicious administration of a new traffic system which will have practical advantages in many localities.

ARNOLD GOODWIN CHAPMAN, JR.

--NOTES--

WORKMEN'S COMPENSATION LAW -

DISABLEMENT RESULT OF ACCIDENTAL INJURY

The claimant, Fannie Lurye, was employed as a saleswoman in a department store. "On October 15, 1936, while the said Fannie Lurye was engaged in the regular course of her employment and while working for her employer, showing coats to a customer, a fellow-employee switched on an electric fan, which caused a draft to be blown upon her, causing her to sustain a chill, resulting in Bell's Palsy, and as a result of which she became disabled." On these facts, the Court of Appeals in Matter of Lurye v. Stern Bros. Dept. Store, 275 N.Y. 182, reversed the order of the Appellate Division and the determination of the State Industrial Board, and granted an award to the claimant under the Workmen's Compensation Law.

The Lurye case is interesting because the Court held that the claimant suffered an accidental injury within the meaning and terms of the statute, and distinguished it from the case of Matter of Lerne v. Rump Bros.,241 N.Y.153.

The Workmen's Compensation Law requires every employer subject to the terms of the Act to "secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment, without regard to fault as a cause of injury, except that there shall be no liability" in a case where the injury was occasioned solely by the intoxication or wilful intention on the part of the injured employee to injure himself or another. (W.C.L.§10).

The injury must have been the result of accident rather than disease, unless the disability is due to one of the occupational diseases enumerated in the statute. The Act definitely states that "injury and personal injury means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." W.C.L.§2, subd.7;§§38,48

In Matter of Woodruff v. Howes Const.Co., 228 N.Y.276 the court stated "that an accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause and therefore not expected."

Two general rules have been laid down for guidance in determinin whether or not a disease may be termed an accidental injury. First, the inception of the disease must be assignable to a determinate or single act, identified in space or time. (Matter of Jeffreyes v. Sag Co., 198 A.D.446). Secondly, it must also be assignable to something catastrophic or extraordinary. (Matter of Connelly v. Hunt Furniture Co., 240 N.Y.83).

A number of cases have stressed the fact as to whether or not th average man would consider a particular disability as an accidental i jury. Mr. Justice Cardozo, in Lewis v. The Ocean Accident & Guarante Corp., 224 N.Y.18, said, "To the scientist who traces the origin of di ease, there may seem to be no accident in all this. But our point of view.....must be that of the average man. Such a man would say that the dire result so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked for mishap, and so an accident. This test - the one that is applied in t common speech of men - is also the test to be applied by the courts."

In the Lurye case (supra), it was possible to fix the time and place where the claimant was struck by the cold air from the electric fan. The court held that it was catastrophic in its nature, saying: "The result was palsy which is limited to one side of the face and is acute in onset and called Bell's - with consequent distortion of the parts and of the powers of expression. We thinkthat the average man would say that so swift and harsh a disablement was an accidental injurywhen it was so strangely suffered in the ordinary day's work."

This viewpoint is supported by Industrial Commission of Ohio v. Middleton, 126 Ohio St.212. The Ohio Court denied an award to a claimant suffering from Bell's Palsy where there was no evidence to the effect that it was the result of a "sudden happening" but rather was the result of prolonged heavy lifting and exposure to rainy and chilly weather for about three weeks.

In the Lerner case (supra), the State Industrial Board found that on a particular morning the claimant "was working for his employer in his employer's plant, and while showing fruit and vegetables to a customer of his employer in the refrigerator of said employer's plant, and because of the sudden transition from the super-heated atmosphere on the outside of said refrigerating plant to the chilly atmosphere in the interior thereof, and as his duties necessitated his remaining in said refrigerator for ten minutes, he received a chill that naturally and unavoidably caused a cold to develop which lowered his disease-resisting power, and as a result pulmonary edema and cerebral embolism and septic endocarditis developed and caused his death on November 22 1923; the proximate cause of his death being the injury that he received in the refrigerator of his employer's plant on June 2, 1923."

The court dismissed the award in the Lerner case, holding, "the exposure although at a definite time and place was not catastrophic or extraordinary. It was like the exposure to drafts when one is heated while at work....Such contacts of the body with the draft or with changes of temperature are natural and normal and often unavoidable in the conduct of a business."

In both the Lurye case and the Lerner case, there was contact with cold air at a definite time and place, resulting in disease. The distinction was based on the fact that in the Lerner case it was a case of "ordinary exposure resulting in a cold." The reasoning was to the effect, that in the Lerner case "to the average man there would seem to be no accident in such a sequence of events," but that in the Lurye case the average man would say there was an accidental injury.

Probably the average man would say that receiving a draft from an electric fan is catastrophic and that coming in contact with cold air in a refrigerator is not, but still the line of difference is close. The court recognizes this when it states at the end of its opinion in the Lurye case (supra) that "For cases like this no general rule can be annunciated."

It is well to note that in most of these cases the court emphasizes the viewpoint of the average man, whether or not he would say that a particular disability is the result of an accidental injury

JAMES WILLIAM DOLAN

--Notes--

DIVORCE - FOREIGN DECREE - EFFECT ON CITIZENS OF THIS STATE

The recent case of May v. May (251 A.D.63) would seem to give rise to much controversy because it appears to hold directly opposite from the opinion stated in the case of Starbuck v. Starbuck (173 N.Y. 503). In the May case the plaintiff brought an action in the Mexican courts for a divorce, and the defendant appeared in the Mexican court by written consent, and submitted to the jurisdiction of the Mexican court. Prior to this Mexican suit, during, and after it, the parties were residents of this State, and, in fact, neither of them ever went to Mexico, much less resided there. After the Mexican divorce was granted, the plaintiff brought this suit for divorce in this State and the defendant moved to dismiss, on the grounds that the Mexican decree is binding on the parties, finally adjudicated their marital status, and, granting that the Mexican judgment was not generally binding, the plaintiff -who was the actor in the Mexican suit- is estopped, by bringing the suit, from invoking the jurisdiction of the courts of this State, upon a theory predicated upon the continued existence of the marital relation between the parties subsequent to the granting of the Mexican decree.

The court very easily disposes of the first part of the defendant's motion, saying "The marital status of the parties resident in this State is a matter of exclusive domestic concern. We are not required to recognize the judgment of a foreign country as having effect upon the matrimonial status of the citizens of this State. To do so would be contrary to our public policy in its protection of marriage and morality." The decree was naturally not binding upon the courts of this State because the Mexican courts never had jurisdiction of the parties nor of the cause.

In the Starbuck case (supra) a wife went from this State to Massachusetts, where she obtained a decree of divorce from a court that had no jurisdiction over her husband, who remained domiciled here. The husband re-married. On his death, the first wife, claiming to be his widow, brought in this State an action to recover dower in real estate of which he died seized. The court, in refusing the plaintiff's demand, said, "A party cannot avail himself of a defence or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach the decree or judgment which he himself has procured to be entered in his favor," and, "We prefer to rest our decision on the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts courts and submitted herself thereto, cannot be heard to question the validity of its decree."

So, a brief review of the two cases would seem to indicate that they are irreconcilable and that one or the other must be flatly overruled. However, this is not so. Two cases have come up since the Starbuck case - Shannon v. Shannon (247 App.Div.790) and Stevens v. Stevens (273 N.Y.157), which show a distinction between the May case and the Starbuck case. In the Starbuck case it will be seen that the plaintiff is attempting to overthrow and repudiate a judgment, although invalid, which she procured in order to gain an advantage for herself, -namely, dower in the divorced husband's property, whereas in the May case, the plaintiff is not seeking to throw out the Medican divorce by showing its invalidity nor is he trying to

gain some advantage by disregarding the Mexican divorce, but rather is trying to procure only what he is entitled to - a valid divorce in New York State. Therefore the prime distinction would seem to lie in whether or not the plaintiff is directly attacking the void decree.

To put to rest any doubt that may exist on the subject, the court held in the Shannon case, in which the facts are almost identical with the May case that, "The relief which plaintiff seeks in this action is not inconsistent with his position in the Mexican proceedings. His procedure herein involves no attack on the prior invalid decree. He seeks no advantage from the Mexican proceedings based on a position contradictory to his acts in that proceeding....nothing to the disadvantage of the wife or her estate, therefore he is not estopped to seek a dissolution of the marriage status on grounds recognized in this State! A different situation would exist if we were taking an inconsostent position and seeking to gain an advantage from the change of position, such as was the situation in the Starbuck case." The Stevens case, which is also the same as the May case except that the plaintiff in the Mexican action is the defendant in this separation action, and is counterclaiming for a divorce, held, "Here the court has invoked to pronounce judgment directly upon the marital status...a relationship which no stipulation or conduct of the parties could alter. Certainly a decree that is void cannot in itself be a reason why he should have less than his legal rights."

THOMAS HAFEY IVORY

PRE-TRIAL REPORT - ITS NATURE AND EFFECT ON A SUBSEQUENT TRIAL OF THE ISSUES

An interesting sidelight in the contemporary enthusiasm on the part of the bench and bar and interested laymen generally toward a more efficient administration of justice is found in the recent words of the Supreme Judicial Court of Massachusetts in Fancuillo v. B.G.& S. Theatre Corp., 8 N.E.(2d) 174. The trend in modern adjective law is toward informality of procedure. The creation of countless administrative boards and commissions in both State and Federal Governments bears witness to this truth and the effect has been to take from the courts much of the original jurisdiction it once had. As to those causes which have been left to be tried in the first instance in the trial courts, there is persistent effort to remove from their pathway the procedural obstacles and delays that impaired their pursuit.

The Massachusetts case referred to above vigorously upholds the use of the pre-trial report which was founded on a court order issued in Suffolk County on June 20, 1935, by a Judge of the Superior Court. Its legal justification is found in the wide powers of that court of general jurisdiction to do justice and to adopt procedure to that end. The order establishes the time for the "pre-trial call" when the presiding judge will consider with counsel, "1. Whether the pleadings are in proper shape; 2. Whether the case is then ready for trial; 3. Whether the issues of the case may be simplified for trial, including also whether the agreements may be made to avoid the bringing to court of unnecessary witnesses, whether the number of expert witnesses may be limited, and other similar preliminary matters; 4. Whether the case may be settled with or without the aid of the Presiding Justice."

From these considerations a "pre-trial report" of the hearing is prepared, which embodies the history of the case and any admissions or stipulations which the parties may have arrived at in their efforts to simplify the trial of the suit and narrow the issues. Of this feature, Rugg, Ch.J., said: " It is highly important that arrangements between the presiding judge and the counsel as to simplification of issues for trial and as to avoidance of bringing to court unnecessary witnesses be put in writing in authoritative form for guidance of the judge presiding over the jury trial."

In the Fancuillo case(supra), the plaintiff, a boy of eight, was evicted by use of force from defendant's theatre, and sued for injuries sustained thereby. The pre-trial report contained a statement that the defendant "concedes that if the usher in the course of preserving order in the theatre assaulted the plaintiff, no question of agency is raised." Thereafter the defendant in his bill of exceptions to the appellate court contended that he was not bound by this statement; -that the question of agency was not settled thereby. The court gave no weight to this contention, and definitely held that the parties were absolutely bound by admission or stipulations made at the pre-trial hearing. The court went further - to hold that it was perfectly proper for the trial judge to read from the pre-trial report in his charge to the jury: "It was entitled to consideration by the jury. It might be given such weight as a document of that nature would commonly have." The statement which contained concession on the part of the defendant as to the question of agency, in the words of the court, "bore directly on the liability of the defendant.

It appears from its inherent nature, as well as from the words of the court, that the use of the pre-trial report is rich in the benefits which it may achieve in the interests of both prospective litigants. If it achieves its purpose it will remove many of the preliminary difficulties of getting the case tried and the rights of the parties adjudicated, with the possibility that costly delays, inconvenience to unnecessary witnesses, and other hazards which make actual court litigation an extreme hardship to the parties who seek to settle their disputes before a court of justice, will be reduced to a minimum. It should help to reduce the number of cases that actually have to be tried and undoubtedly has facilitated the parties in arriving at a fair settlement.

The use of the pre-trial report is sighificant from another point of view and that is in the manner and method in which these procedural improvements have found their way into the judicial machinery of both State and Federal practice. Of course it is true that it is inherently within the power of the court to adopt rules for its own proceedings. This power, formerly rather sparingly used, has recently been expanded and various State Legislatures, as well as Congress, have shown a disposition to abdicate more and more their voice over rules of practice and procedure. Some jurists argue that there need be no formal surrender of this power by the legislative branch of the Government to the judiciary - that it is the inherent power of the courts set-up what practice shall be followed in the litigation brought before it. "A nationwide effort should be made to get our courts without legislative assistance to assert their power to make procedural rules governing trials and appeals. By this method we shall obtain a finer procedural system than will result fro legislative rules."(Vol.XXII Am.Bar Ass'n Journal 642).

This is undoubtedly a constitutional question. But outside the question as to the constitutionality of the movement in any particular jurisdiction, the spirit and enthusiasm of the various state bar associations and the American Bar Association in this direction, indicate a wholesome and healthful trend in American jurisprudence. The seed of procedural reform should find a much more fertile field in the courts themselves. They are primarily concerned in improvements of procedural rules. The legislatures of the various states have lacked both interest and time to better intelligently the legal machinery of their particular sovereign. Political influence has been more direct, and often extremely detrimental to improvements in practice. It seems that the courts themselves are best fitted to design the improvements towards a more expeditious legal system. The courts are more sensitive to the changing necessities that arise with changing conditions. They should understand more acutely the weaknesses and evils of the contemporary practice. They should be better disposed to keep reform itself above the influence of political ambitions and caprice - where the ends of justice alone will be the great objective in a constructively evolutionary improvement in procedure.

JAMES STUART HOLDEN

ANSWERS

1. Held. No. May v. May, 251 A.D.63. Law Review, p.35

2. No, according to Gitlow v. N.Y., 268 U.S.652. Law Review p.12

3. No, according to Charles C. Steward Machine Co. v. Davis, 81 L.Ed.779. Law Review page 1.

4. (I) Yes. (Pieczonka v. Pullman Co., 89 Fed.(2d)353.
(II) Only those which A can prove have accrued since March, 1931. Law Review p.27.

5. Yes, according to Hock v. Endee Management Corp.,269 N.Y.592.

6. Yes, - Re Opinion Justices, 8 (2d) N.E.179.

7. Yes. Holger v. Reichsbahn, 159 Misc.830. Law Review p.18.

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CONFLICT OF LAWS - INHERITANCE TAXES

The development of our present-day industrial civilization has tended immeasurably to increase the problems in the field of taxation. Whether or not we will ultimately be able to revise our system of taxation, so that it will rest on a more scientific and equitable basis remains to be seen, but undoubtedly for some time to come our courts will be called upon to decide a great deal of litigation in this field.

We are concerned in this article with the general subject of Death Taxes; or to be more specific, the rules regarding the jurisdiction of the several states to impose inheritance taxes on a decedent's property. In determining the validity of a state tax in a specific case, we must first examine the statute to see whether it covers the property sought to be taxed, and then we must ascertain whether or not the state has jurisdiction over the person or property of the decedent. The nature of the property, whether it is realty or personalty, is of importance since recent decisions have distinguished between real property, tangible personal property, and intangible personal property.

The early cases held that all personal property should be treated alike. Since later cases hold that tangible personalty should be distinguished from intangible personalty, it is interesting to note the various types of intangibles which the court has from time to time said should be subject to a different rule from the one applied to tangible personal property.

In order to refresh our recollection as to the general classification of personalty, we may look at the definition of these terms in the New York Tax Law. "The term 'Tangible personal property' means corporeal personal property, including money, and the term 'intangible personal property' means incorporeal personal property, including deposits in banks, mortgages, debts, receivables, shares of stock, bonds, notes, credits, evidences of an interest in property, evidences of debt and choses in action generally." (New York Tax Law §249-m Subd.f.)

The rule as to real property, that real property and any interest therein is taxable only by the jurisdiction where the property is situated, is well settled and the courts have had no difficulty in applying this general rule. Paddell v. New York, 211 U.S. 446.

Most of the litigation over inheritance taxes has arisen regarding the jurisdiction of the several states to tax personal property. While some phases of this topic are clear and definitely settled by rulings of the United States Supreme Court, yet others are very complex and it is difficult to determine any definite rules regarding the same. This confusion naturally results from the great number of taxing agencies in the United States, together with the many types of taxes which they impose. It is the purpose of this writer merely to discuss a few of the many cases on this subject, and to outline briefly the development of the general rules laid down by the court regarding this question.

The common law theory of mobilia sequuntur personam, that the situs of personal property follows its owner, was strictly followed

by our courts for some years. In the case of Blackstone v. Miller, 188 U.S.189, the court held that a deposit, (consisting of the proceeds received from a sale of Blackstone's stock and held by the trust company subject to his order) in a New York Trust Company to the credit of Blackstone, a resident of Illinois, was subject to a transfer tax by New York, even though the whole succession, including the New York deposit, had been taxed in Illinois. Mr. Justice Holmes argued, that if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. That "power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death." The court did not discuss the question as to whether a distinction should be made between bank deposits and tangible chattels. Thus the effect of this decision upholding the New York tax was to permit the taxing of bank deposits at the debtor's domicil as well as at the domicil of the creditor.

In 1924, in the case of Frick v. Pennsylvania, 268 U.S.473, the court established the rule for the taxing of tangible personal property. Henry C. Frick, domiciled in Pennsylvania, died testate in that State. Besides property in Pennsylvania, his estate included tangible personalty having an actual situs in New York, and tangible personalty with a like situs in Massachusetts. His will was probated in Pennsylvania, and letters testamentary were granted there. It was also proved in New York and Massachusetts, and ancillary letters were granted therein. The Pennsylvania statute provided for a tax on all property of a decedent, whether within or without the State; so a tax was placed thereon, which included the value of thetangible personalty in New York and in Massachusetts. The court stated that the trend of decisions pointed out, "first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra-territorial operation; and, thirdly, that as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner."

The court stated that the tax here was not a property tax, but was one laid on the transfer of property on the death of the owner; since this property was wholly under the jurisdiction of New York and Massachusetts, it was in no way under the jurisdiction of Pennsylvania. Therefore, it was held, that the "Pensylvania statute, insofar as it attempts to tax the transfer of tangible personalty having an actual situs in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid."

The Frick case was distinguished from the Blackstone case on the ground that the latter related to intangible personalty which should be regarded on a different basis from tangibles. Thus we can see that the Frick case removed tangible personal property from the burden of double taxation, which would have been imposed if the court had followed the Blackstone case.

One of the latest cases to follow the Frick case is that of City Bank Farmer's Trust Co. v. Schnader, 293 U.S.112.

Since the decision in Safe Deposit & Trust Co. v. Virginia, 280

U.S.83, the court has in a number of cases listed certain intangibles that are subject to the imposition of an inheritance tax only by the state of the domicil of the creditor-owner. In this case, a resident of Virginia delivered stocks and bonds to a Maryland trust company to hold as trustee for his sons who were domiciled in Virginia. The Trust Company held the stock and bonds in Maryland, and paid taxes thereon to that State. The State of Virginia also taxed the whole corpus of the trust estate. In holding the Virginia tax invalid, Mr. Justice McReynolds said: "Here where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact, the securities did not and could not follow any person domiciled in Virginia. - It would be unfortunate, perhaps amusing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

The fiction of mobilia sequuntur personam was limited here only insofar as it might have been applied to an equitable creditor-owner. Actually the only question decided here, was, that only the state where the legal creditor-owner was domiciled, with said stocks and bonds actually in its possession, could impose a valid tax. This case did not conflict with the Blackstone case, because there was no question here regarding the right of a state to impose a succession tax on debts owned by its citizens.

In Farmers Loan & Trust Co. v. Minnesota, 280 U.S.204, however, the court definitely overruled the Blackstone case. Here one Taylor, while domiciled and residing in New York, died testate leaving here certain bonds and certificates of indebtedness issued by the State of Minnesota and several of its cities. None of these certificates was connected with any business carried on by nor for the decedent in Minnesota. Both New York and Minnesota placed an inheritance tax upon the same testamentary transfer. In overruling the Blackstone case the court held: "The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. Blackstone v. Miller no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled."

The court further stated that: "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding as far as possible unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota. -- The bonds and certificates of the decedent had acquired permanent situs for taxation in New York; their testamentary transfer was properly taxable there, but not in Minnesota."

Mr. Justice Holmes dissented in this case, reaffirming his be-

lief in his argument in the Blackstone case; stating that this transfer was properly taxable in New York, but that since the law of Minnesota was necessary to the existence of the obligation, then Minnesota also had the right to demand payment for a privilege that could not exist without his help.

Although logically Mr. Justice Holmes may have been correct, yet it seems to this writer that the majority view is the more desirable one. By rejecting an argument that permitted two states to have the power to tax the same transfer on different and inconsistent principles, it seems that the court has opened the door to a more practical and reasonable system of death tax laws.

Baldwin v. Missouri, 281 U.S.586, held that where a resident of Illinois died owning certain intangible property, including credits for cash on deposit with Missouri banks, United States coupon bonds, and notes physically present in Missouri which had been executed by citizens of Missouri, but which had not been given a business situs in Missouri, that said property was taxable in Illinois but not in Missouri. The court said: "The situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwise. The bonds and notes,although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor."

The case of Beidler v. South Carolina Tax Commission, 282 U.S.1, is interesting because the facts seem to bring it very close to a line of cases which permit the taxing of certain intangibles even though owned by a non-resident. Beidler, a resident of Illinois, died in that State owning 8,000 shares in a South Carolina corporation and his wife owned the remaining 7,000 shares of the corporate stock. The question here concerns the validity of a South Carolina tax on a debt owed by the South Carolina corporation to Beidler for loans previously made to it. This indebtedness was also included by Illinois in the computation of the value of the decedent's estate, for the purpose of fixing the tax payable in Illinois.

The South Carolina tax was held invalid. The court pointed out that, "It is now established that the mere fact that the debtor is domiciled within the State does not give it jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who is domiciled in another State. The transfer is taxable by the State of the deceased owner."

An attempt was made to bring the Beidler case under the rule laid down in New Orleans v. Stemple, 175 U.S.309, to the effect that where certain intangible personal property is used in business, it acquires a special situs and is taxable in the state of investment. In the New Orleans case, the plaintiff was guardian for infants who were residents of New York. They inherited property, consisting of credits and money from their grandfather, a resident of Louisiana. "It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that those notes and mortgages were in the City of New Orleans, in possession of an agent of the plaintiff, who collected the interest and principal as it became due and deposited it in a bank in New Orleans to the credit of the plaintiff." The question here concerned the validity of the Louisiana tax; it did not appear that New York laid any tax thereon. The court held the Louisiana tax valid, that the fiction that personal chattels follow the person of the owner did not apply,

that the property here had acquired a situs in the State and was properly taxable therein.

However, the court in the Beidler case did not follow the New Orleans case, saying that beyond the mere fact of stock ownership and the existence of the indebtedness, there was no other evidence having any bearing upon the question. That the evidence as presented afforded "no adequate basis for a finding that the indebtedness had a business situs in South Carolina."

The opinion of Mr. Justice Sutherland in First National Bank v. Maine, 284 U.S.312, merits our attention, because in it the learned Justice outlines the leading cases on this subject. The case itself follows the rule established in the Farmers Loan & Trust Co. case. In the First National Bank case, the court held that the State of Maine could not tax a transfer by death of shares of stock in a Maine corporation owned by a resident of Massachusetts, said stock being actually held in Massachusetts. "We conclude that shares of stock lik the other intangibles can be subjected to a death transfer tax by one state only."

The court further discussed the maxim mobilia sequuntur personam, and this writer believes it worth while to include the same at this point. "This ancient maxim had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels, and apparel, and, less immediately animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner the rule has gradually yielded to the law of the place where the property is kept and used. But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property."

Apart from the question of death taxes, but concerned in fact with the question of business situs is the recent case of New York ex rel. Whitney v. Graves, 299 U.S.366, concerning the right of New York to tax the sale of a stock exchange seat. The question here relates to the validity of a New York tax imposed upon the profits realized from the sale of a right to a one-fourth membership in the New York Stock Exchange. Whitney argued that he and his partners were non-residents; that they transacted all their business in their office at Boston; that they did not buy and sell on the floor of the Exchange, but transmitted their orders to others; that their membership is intangible personal property of the sort that is only taxable at the domicile of the owner. The New York tax was held valid by the court, emphasizing the fact that membership in the Exchange was local in its nature, that it could only be exercised there, and that the mere failure of the relator to use his right to trade on the floor was of no consequence. "We think that the dominant attribute of relator's membership in the New York Stock Exchange so links it to the situs of the Exchange as to localize it at that place and hence to bring it within the taxing of New York."

After reading these cases, we find that the rules as to inheritance taxes are fairly well settled; that real property is taxable by the state where it is located; that tangible personal property is

only taxable at its situs, regardless of the domicil of its owner; that the court has held certain intangibles, including stocks, bonds, notes, bank deposits, and debts, which have not acquired a business situs elsewhere, are taxable only at the domicil of the creditor-owner.

I do not believe, however, that the First National Bank v. Maine case (supra) has ended the confusion regarding shares of stock. This writer regrets his inability, at this time, to adequately pursue the issue that remains, but simply wishes to point it out.

Keeping in mind that an inheritance or estate tax is an excise on the privilege of succession to the estate of a deceased owner, we meet the proposition that a state may control the operations of corporations which are formed under its laws; that it is, or has been, generally recognized that a state may impose a tax on the transfer of the stock of such a domestic corporation.

In Frick v. Pennsylvania (supra), besides the question concerning the taxing of tangible personalty which we previously discussed, the right of Pennsylvania to tax stock transfers was also decided. Mr. Frick owned stock in foreign corporations and his executors were required to pay to the States, wherein said corporations were domiciled, taxes as a prerequisite to an effective transfer. Pennsylvania refused to make any allowance for the taxes paid to said States In holding the Pennsylvania tax invalid, the court said: "As those states had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicil and the actual situs of the stock certificates. We are of the opinion that insofar as the statute requires that stocks of other states be included at their full value, without deducting the tax paid to those states, it exceeds the power of the state, and thereby infringes the constitutional guaranty of due process of law."

As stated previously, the First National Bank case held that the State of Maine could not impose a tax upon a transfer by death of shares of stock in a Maine corporation, forming part of the estate of a decedent who at the time of his death was domiciled in Massachusett Therefore we can see that the court distinguished the Frick case. In its opinion the court stated: "Undoubtedly, the state of incorporation may take the transfer of the stock of a non-resident decedent, and the issue of a new certificate to take the place of the old, unde the power generally to impose taxes of that character. But plainly, such a tax is not a death duty which flows from the power to control the succession; it is a stock transfer tax which flows from power of the state to control and condition the operations of the corporations which it creates."

Thus it seems that as far as stock transfers are concerned, if we can call the tax on the transfer a death tax, then only the state of the domicil of the owner can impose such a tax and not the state of the domicil of the foreign corporation; but on the other hand if it is simply a tax on the transfer of stock, then the state of domicil of the foreign corporation may impose such a tax.

JAMES WILLIAM DOLAN

RES IPSA LOQUITUR

Probably one of the most valuable aids to a plaintiff in a civil action for damages resulting from the negligence of a defendant is the doctrine of res ipsa loquitur. Res ipsa loquitur, or the thing speaks for itself, is relied upon in countless thousands of cases in order to sustain a recovery for the plaintiff, where although he is really entitled to recover and the fact can plainly be seen, yet because he is not able to explain exactly how the damage occurred and to pin it absolutely on the defendant, he would otherwise be doomed to failure in the case. Many cases arise in which there are no eye witnesses to the accident or to the destruction of property, or in which the plaintiff is the only person present when he is injured, but due to the suddenness of the act, he is unable to explain precisely what caused it. Nevertheless, it is possible for him to show the conditions existing at the time and to show that it could only have happened in a certain way and that all of these conditions were under the exclusive control of the defendant, thereby, proving that the defendant must be liable for the result. To refuse a recovery under such circumstances hardly seems to be doing justice, therefore we have the valuable and important doctrine of res ipsa loquitor.

It is true that ordinarily, negligence or freedom from contributory negligence will not be presumed, but when the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen, if reasonable care is used, in the absence of explanation of the defendant, it affords sufficient evidence that the accident arose from want of care on its part. This is what we call the doctrine of res ipsa loquitur. From this definition we can see that res ipsa loquitur is composed of three elements, all of which must concur in order to make it apply; they are, first, the instrumentality which causes the injury to the plaintiff must be under the control of the defendant; second, the accident is such as in the ordinary course of business does not happen if reasonable care is used; and third, the defendant must be unable to give an adequate explanation of the injury so as to relieve himself. If any of these conditions are lacking, the plaintiff's case must necessarily fail. So the rule is not so sweeping and inclusive as one might at first think. The plaintiff is not getting something for nothing, nor is the defendant deprived of property by having to put up with the doctrine.

This doctrine does not relieve plaintiff of the burden of proof nor raise a conclusive presumption in his favor. The fact of the occurrence and attending circumstances merely furnish some evidence which requires the defendant to go forward with his proof and rebut the presumption of negligence arising therefrom. For example, by the defendant's showing precisely the cause of the occurrence and that the cause is attributable to some person other than the defendant, for whose acts he is not responsible, or that the cause is of such a character that the defendant is not culpable in connection therewith, but that such occurrence is in the nature of an accident unavoidable by the use of ordinary care will overcome the presumption and the burden is still on the plaintiff to establish his cause of action.

As was said in Shearman v. Redfield on Negligence §59: "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding

circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to show."

The best way to illustrate how the doctrine applies is by showing some of the actual cases decided upon the point. In Griffin v. Manice, 166 N.Y.188, the intestate was descending in an elevator from the eighth floor to the basement, and instead of stopping at the basement it continued on down to the bottom of the shaft. It struck the bumpers and rebounded 18 inches, throwing the persons in it to the floor. The counterbalance weights fell down the shaft and broke through the top of the car, one of them striking and killing the intestate. The defendant objects to the charge in which was contained res ipsa loquitur. The Court of Appeals in upholding the charge to the jury, said, "The trial court is justified in permitting the jury to infer the negligence from the accident, under the doctrine of res ipsa loquitur, since it could not have ordinarily occurred had the elevator machinery been in proper condition and properly operated, the term 'accident' being construed to include not only the injury but the attendant circumstances. The maxim is in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to prevent."

This case shows clearly how the doctrine applies. The plaintiff showed all that was within his power and if the defendant was not liable, he could have shown very clearly by proving that a third person had weakened the cables or that it was not under his exclusive control in that the plaintiff had agreed to take care of the elevator in his lease of the certain floors. It can be seen that no injustice is being worked upon defendant by asking him to explain something in order to overcome the presumption.

In Peck v. N.Y.C.R.R.Co., 165 N.Y.347, which was an action for injury to plaintiff's property by fire it was said: "But while it was necessary for plaintiff to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine, or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was defective in its condition as negligently operated." The court, in Griffin v. Manice, supra, in commenting upon the above statement said: "This is the principle which underlines the maxim of 'res ipsa loquitur.' When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurred, we speak of it as a case of 'res ipsa loquitur;' when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence." Again in Benedict v. Potts, 88 Maryland 52, it is said: "In no instance can the bare fact that injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proc of circumstances, from which its existence may be inferred.

"This phrase (res ipsa loquitur), which literally transalted means that, 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident."

Perhaps at this point it would be advisable to consider just what we mean by "presumption." If I should look out the window and see that the sky was cloudy and it looked very much like rain although it was not raining at the time I looked out and five minutes later a person enters my room with a raincoat and rubbers on and both very wet, I would be justified in inferring that it had rained. That is, from all the facts taken together - cloudy sky - raincoat - rubbers - water dripping from the objects, another fact may be logically presumed, i.e., that it is or was very recently raining. So in the case of res ipsa loquitur. Where all the facts and circumstances are considered, we may logically say that they imply another. In other words, the fact follows in order from the facts which are involved.

Passing on from the case of Griffin v. Manice, we have two earlier cases in which the rule was applied - the case of Breen v. N.Y.C.& Hudson R.R.R.C., 109 N.Y.297, and the case of Hogan v. Manhattan R. Co., 149 N.Y.23. In the Breen case, the plaintiff, who was a passenger on one of the defendant's trains, while sitting by an open window with his arm resting on the sill, so that the window could have been closed without touching his arm, was struck on the arm and injured, as the evidence tended to show, by a swinging door on a passing freight train. The plaintiff proved all the above facts but no explanation was offered by the defendant. However, the defendant contends that the plaintiff has not put in sufficient evidence from which the defendant may be held liable. The court held that want of proper care on defendant's part was to be presumed, and a recovery by the plaintiff was proper. The plaintiff had proven all the facts attendant upon the happening of the accident and also facts to show that he was not negligent. From these facts we may see that the plaintiff was not negligent and that the defendant must have neglected to look out for the safety of the passengers. If the defendan had proved that the plaintiff's elbow extended out of the car instead of giving no explanations, it would have shown that the plaintiff was negligent and would have compelled the plaintiff to go on with the proof to show his freedom from negligence.

The plaintiff, in the Hogan case, was driving under the defendant's elevated railroad and he heard a clattering upon the elevated and a piece of pipe dropped, striking him on the leg. Several workmen worked on the elevated and one of the climbed down from the tracks and picking up the bar, returned to the elevated. After the plaintiff had put in this evidence, the court directed a verdict for him. The Court of Appeals, reviewing the verdict, said: "It is assumed that buildings and other structures properly constructed, do not ordinarily fall upon the wayfarer; so also if anything falls from them on a person lawfully passing along the street or highway, the accident is prima facie evidence of negligence, or, in other words the presumption of negligence arises." The workmen were servants of defendant, and, therefore their negligence could be imputed to the defendant, making the exclusive control of the object which caused the injury under exclusive control of defendant.

However simple the rule may seem to be, it causes the student of law, and in fact, the lawyer himself, much difficulty. There are

many cases which we think at first glance fall squarely within the rule and yet the court has declared that it does not apply. Usually by studying these cases and comparing them with other cases in which the rule does apply, we are able to understand the difference. Probably the point that gives us the most difficulty is deciding whether or not the instrumentality is under the exclusive control of the defendant - that is, can we say that the accident could not be explained except by imputing negligence to the defendant? In Wolf v. American Tract Society, 164 N.Y.30, a brick fell from a building, injuring a pedestrian. The building was in the process of construction and many workmen under the contract of numerous contractors, were all engaged in work thereupon. The plaintiff seeks to hold the owner and seeks the application of the rule of res ipsa loquitur. It was held that the circumstances of the accident gave rise to a presumption that the owner of the building or a particular contractor had been negligent. This illustrates what has been said above. If the plaintiff had shown that there was only one contractor and that all the workmen were under his control, undoubtedly the court would have applied the rule, but when any one of three or four people may be responsible for the accident, it is not right to say that one must be presumed to be negligent.

The two cases of Mullen v. St. John, 57 N.Y. 567, and Piehl v. Albany R.R.Co.,30 A.D.166, affirmed 162 N.Y.617, were decided differently, yet in all probability, correctly.

In the Mullen case it was held that the falling of an adjacent building into the street whereby the plaintiff, traveling in the street, was injured, was prima facie evidence of negligence.

In the Piehl case a flywheel was disrupted and a portion of it cast across the street into a saloon, hitting the plaintiff's intestate. It was held that the mere bursting of the fly wheel was not sufficient to warrant the inference of negligence.

The court thought that in the absence of tempest or external violence a building does not ordinarily fall without negligence; while it also though that the disruption of the flywheel proceeds so often from causes which science has been unable to discover or agains which art cannot guard, that negligence cannot be inferred from the occurrence abovel

It would be quite possible to inspect a flywheel very minutely and not discover any defects, yet the flywheel may fly apart. This rule does not make the defendant absolutely liable in every case but only in cases where he is guilty of negligence and by reasonable care could have averted the accident. A flywheel comes apart quite often and this even though the person using it exercises reasonable care in inspecting and using it. So we really can say that the two cases are correctly decided without violating the rule.

As has been pointed out, it is necessary to show that the defendant is liable to the plaintiff. The court is very careful in applying the rule, and where it is possible that some third person other than the defendant, and over whom the defendant exercises no control, might be liable for the injury, the court will refuse to charge the jury as to res ipsa loquitur.

It was held not to apply in Cunningham v. Dady, 191 N.Y.152. The defendant had by contract with New York City laid a water pipe by digging a trench six feet deep and three feet wide. When the earth

was shoveled back into the ditch, it was carefully tamped and packed down and water put on it at intervals so that it would settle. The Street Railway had relaid the tracks and dug 18 inches deep and right up to the point of defendant's trench. A temporary pavement had been laid by the city to allow the ground to settle and then a permanent one. Two months later the plaintiff sank in up to his hips when a paving block went down. The paving block was about a foot from defendant's trench. The judge refused to charge res ipsa loquitor and the plaintiff appealed. The Court of Appeals reviewed other cases in which res ipsa loquitor had been applied and said: "But in those cases there was no question as to the cause of the accident or the party liable therefor. This case is different. A grave doubt exists as to the party liable. . . The cave-in might have been caused by other agencies than that of the contractor." The court refused to reverse the judgment. The negligence of the Street Railway Company or the City might have caused the cave-in. Because plaintiff had not proved which one was liable because of negligence, the court refused to hold the one defendant under res ipsa loquitur.

It is necessary that the plaintiff put in sufficient facts from which the negligence of the defendant may be presumed, but where, when all the evidence is in, we can see that the plaintiff's negligence might have been the cause of his injury although the defendant might also be involved, res ipsa loquitur will not be applied.

In the rather recent case of Beltz v. Buffalo R.& P. Ry.Co., 222 N.Y.433, the plaintiff 's case was reversed because of this fact. The plaintiff alighted from the train-steps by stepping upon a box placed by the trainman in front of the steps of the car for the purpose of reducing the height that passengers would be required to step. The box slipped as plaintiff stepped upon it, so that he lost his balance and fell to the platform. It is not claimed that the plaintiff was not given ample time to alight from the train nor that the stepping-box was defective. On the contrary, the evidence shows that the box was firm and level and did not move prior to the plaintiff's stepping upon it. The plaintiff was given a verdict by the jury. The court reversed the verdict and said: "It is not a case for the application of res ipsa loquitur against defendant. If the plaintiff's unfortunate accident was the result of negligence on the part of the defendant, it was not shown. It would appear rather to have been the result of the plaintiff's weight in connection with the lateral pressure on the box caused by the position of the plaintiff when he stepped thereon. The jury's conclusion was a mere guess without any justifiable basis; therefore it should not be sustained."

The latest case on the subject which is available at this time and which shows that the rule is still being applied in the same manner and to the same extent as it always was, is the case of Phillips v. Southern California Edison Co., Ltd., 72 Pac.(2d)___, decided on October 20, 1937. All the facts necessary to the rule are embodied in the case, and the court had no hesitation in applying the rule. The plaintiff owns a resort in the mountains and claims damages for a forest fire which it is alleged was started through the negligence of the defendant. The defendant ran transmission lines through a clearance near plaintiff's resort and an arc occurred between defendant's line and a tobacco plant which caused the fire. It was a hot day and defendant's lines sagged. The defendant contends that it is not a case for the application of the rule because the line was at too great a distance from the plant to

arc without some outside interference. There is substantial evidence, however, to sustain the plaintiff's theory that the cable came within arcking distance of the tobacco plant making due allowance for the portion of the tobacco plant destroyed by heat and fire. The court said: 'A logical allowance for expansion would bring the transmission line close enough to the tobacco plant to permit the arc. The arc came from defendant's transmission line. No one else had anything to do with the maintenance of that line. Defendant was charged with the duty of using due care to keep the right-of-way used by that line clear of anything which might make the presence of the line a hazard in the forest area. Since no one who saw the tobacco plant before the fire, was available to testify as to the precise distance within which it came to the transmission line, it is proper to resort to the doctrine of res ipsa loquitur."

So, in summing up we may say the fact of the injury and the attendant circumstances may give rise to an application of the doctrine where the object which produces the injury has been shown to be in the custody and under the control of the person charged with the fault and that it is clear as to the cause of the injury and the party liable.

THOMAS HAFEY IVORY

CONSTITUTIONAL LAW - UNFAIR COMPETITION - FAIR TRADE ACT

In the comparatively recent case of Bourjois Sales Corp. v. Dorfman, 273 N.Y.167, we find the very unusual situation of the Court of Appeals overruling a decision of that same Court, Doubleday, Doran & Co. v. Macy & Co., 269 N.Y.272, one year and two months before. The reason for such a result, as the Court points out, is the interesting decision in the United States Supreme Court in the case of Old Dearborn Distributing Co. v. Seagram Distillers Corp., 57 S.Ct. 139, the Court of Appeals feeling "it to be our duty to submit our own judgment to the rulings of the Supreme Court on the Constitution of the United States and the interpretation of its own decisions. People ex rel. Tipaldo v. Morehead, 270 N.Y.233, 235."

Before entering upon an examination of the law as developed by these and other decisions it will be convenient to have a brief review of these more recent cases.

In the Bourjois Sales Corp. case the complaint alleged, in substance, that plaintiff was the owner of a business in the State of New York, engaged in the sale and distribution to retail dealers of perfumes, toilet preparations and cosmetics bearing certain trademark brands, names, and labels; that written contracts had been entered into between plaintiff and numerous retail dealers fixing the minimum prices at which the said toilet preparations, perfumes, and cosmetics should be re-sold by such retail dealers; that defendant, as the owne of a retail drug store in the City of New York, had declined to enter into a similar contract with the plaintiff or to observe the prices s established and was selling and offering for sale, the said goods at prices less than those stipulated in the contracts referred to, in violation of §2 of Chapter 976 of the laws of 1935. Plaintiff prayed for judgment that defendant be restrained from selling or offering fo sale in the State of New York the commodities distributed by plaintif at less than the prices stipulated in the contracts entered into with other retail dealers.

In Chapter 976 of the Laws of 1935 the Legislature undertook to prevent price-cutting in the sale of commodities. In §1 of the Act a contract was declared to be legal which provides that a buyer of a commodity bearing the label, trade-mark, brand or name of the producer, will not re-sell such commodity at the price stipulated by the vendor. This provision was nothing new, as such contracts were legal under court decisions,

Section 2, however, went much further, and read: "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of §1 of this Act, whether the person so advertising offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

In the case of Doubleday, Doran & Co. v. Macy & Co., 269 N.Y. 27 the plaintiff made a contract with Doubleday, Doran Book Shops, Incl, a seller and distributor, as to the price at which certain books could be sold. Later the latter Corporation sold these books to R.H. Macy & Co. without any contract or restriction as to the price or eve a request for a contract. When Macy & Co. undertook to sell these

books at its own figure, the publisher sought an injunction to compel Macy to sell the books at the price it had fixed with the other Doubleday Corporation.

The court said in the Bourjois Sales Corp. case: We thought this to be a clear case of unauthorized restriction upon the disposition of one's property and unconstitutional within former decisions of the United States Supreme Court. That Court has taken a different view in Old Dearborn Distributing Co. v. Seagram Distilling Corp., 299 U.S.183

In this case the court was required to pass upon the validity of §§1 and 2 of the Fair Trade Act of Illinois, (Smith Hurd Ill.Stat. C-121½ §188 et seq.; Illinois Rev.Stat. 1935 C 140 §8 et seq.) This Act is similar to the New York Fair Trade Act.

The facts of the Old Dearborn case are, in substance, as follows The suit was brought to enjoin the defendant from willfully and knowingly advertising, offering for sale, or selling certain brands of whiskey at less than the price stipulated by plaintiff in accordance with contracts made in pursuance of the Fair Trade Act, between plaintiff and distributors or retailers of such whiskey.

The plaintiff is a dealer in alcoholic beverages at wholesale. I buys the products here in question from the producers. The whiskeys bear labels and trade-marks, and are in fair and open competition with commodities of the same general class produced by others. Defendant is a corporation operating four retail liquor stores in Chicago, and selling at both wholesale and retail. Contracts in pursuance of the Fair Trade Act have been executed between plaintiff and certain distributors and numerous retail dealers. Plaintiff does not sell directly to any retailer. Defendant sold the products in question at cut prices and continued to do so after defendant's demand that it cease such practice.

The record shows that one of the retailer's contracts drawn in pursuance of the Act was signed by defendant's secretary and treasurer prior to the commission of the acts complained of. This contract, among other things, provided that the product in question should not be sold, advertised, nor offered for sale in Illinois below the prices to be stipulated by plaintiff.

The defendants attacked the validity of the Act upon the ground that it denies due process of law and the equal protection of the law in violation of the Fourteenth Amendment. The defendants cite as authority that such contracts are invalid the case of Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S.373, 31 S.Ct. 376. In that case the Supreme Court held that a system of contracts between manufacturer and retail merchants which sought to control the prices for sales by all such dealers by fixing the amount which the consumer should pay, amounted to an unlawful restraint of trade and, therefore invalid at common law. The court said: "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand;" - that such contracts were contrary to public policy, and, therefore, void.

An extremely interesting dissenting opinion which deserves deep consideration was written by Mr. Justice Holmes. He says: "What, then, is the ground upon which we interfere in the present case?.... Perhaps it may be assumed to be the interest of the consumers and the

public. On that point I confess that I am in the minority as to the larger issues that are here concerned. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we ceas to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles' medicines. With regardto things like the latter, it seems to me that the point of most profitable returns mark the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in the words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume that its retail price is reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the Company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get....." In short, Mr. Justice Holmes argues that such contracts are not against public policy - the very foundation upon which the majority of the court based its decision.

The court said in upholding the validity of the Illinois Fair Trade Act in the Old Dearborn case that there was no constitutional objection to such a statute as the one above. "And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary. In the Dr. Miles Medical Co. case, 220 U.S.373, at page 405, 31 S.Ct. 376, 383, 55 L.Ed.502, the court said: "Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even theug the restriction be known to purchasers, fix prices for future sales." In Boston Store v. American Graphophone Co., 246 U.S.8, 26, where the Supreme Court struck down a stipulation that patented articles should not be re-sold at prices other than those fixed presently and from time to time by the patent owner, it was suggested that if this view resulted in damage to the holders of patent rights or the law afforded insufficient protection to the inventor, the remedy lay within the scope of legislative action. In a concurring opinion at page 28 it was said: "If the rule so declared is believed to be harmful in its operation, the remedy may be found . . . through application to Congress." While these observations of the court cannot be taken as decisive of the question yet they illustrate the point that the court could see no valid constitutional objection to them for it cannot be supposed that the court would suggest a legislative remedy which they deemed invalid.

Therefore in applying these statements it does not seem that it was the court's intention to overrule the Dr. Miles case. The court draws the distinction between contracts which are not sanctioned by legislative enactment and contracts which are so sanctioned. Contracts not so sanctioned are deemed to be invalid on the ground of public policy. In creating a legislative enactment the state in effect says that such contracts are not in violation of the public policy of the state and are, therefore, valid. Whether or not the court should de-

clare a contract invalid which was not so sanctioned should such a case arise, it did not determine. Public policy depends in such cases on the economic viewpoint and beliefs of the judges, and of the country as a whole. Whether or not such contracts, today, are against public policy in the absence of legislation raises a very serious question which will not be answered until a case arises on which the court is required to pass.

The defendant in the Old Dearborn case contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Defendants invoke the well-settled principle that the right of the owner of property to fix the price at which he will sell is an inherent attribute of the property itself, and as such is within the protection of the Fifth and the Fourteenth Amendments, and in support of this contention cites Charles Wolf Packing C v. Court of Ind. Relations, 262 U.S.522, 43 S.Ct.630, 67 L.Ed.1103. The case involved the validity of the Court of Industrial Relations Act c Kansas. The Act declared the manufacture and preparation of food for human consumption to be clothed with a public interest; and vests an industrial court with power to hear labor disputes and fix wages.

The court, speaking through Mr. Justice Taft, declared the business of slaughtering was not such a business as was affected with a public interest to the extent that the State could fix the rate of wages; that such legislation deprived a person of liberty and propert without due process of law in that it unreasonably interfered with th freedom to contract, and was, therefore, unconstitutional. The case is easily distinguishable from the Old Dearborn case. In the Wolf case the Legislature itself attempted to fix prices for labor. In the Old Dearborn case the Legislature attempted no such thing. It merely declared that a contract whereby the re-sale price was fixed was not invalid because of the fixing of such price. Here the parties to the contract, themselves, fixed the price at which it could be re-sold.

In the Doubleday Doran case, the charge that the Legislature was fixing the prices for the re-sale of books was the main reason why the Court of Appeals held the Fair Trade Act, §2, of New York invalid. The court said, 269 N.Y.272, 281: "That the State cannot fix the selling price of any and all commodities has been settled..... To fix arbitrarily the price of books by legislation and not by agree ment comes within the condemnation of the decisions which have heretc fore dealt with like legislation. What the Legislature cannot do directly it cannot do indirectly nor does it cease to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it." To my mind this argument cannot stand. The court accuses the Legislature of an attempt to fix prices by a delegation of authority. But here there is no such fixing of prices by the Legislature. It merely says that one may fix prices if he so chooses and the person so dealing with him is content to contract in such a manner. The Legislature does not say that the price must be fixed at a certain sum. It leaves the fixing of prices to the will of the contracting parties. Is this a fixing of prices by the Legislature? Logic would seem to say "no."

The court in the closing words of its opinion held §2 of the Free Trade Act unconstitutional. This was clearly erroneous. "And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary." Old Dearborn Case, 47 S.Ct.139, 143.

Therefore, in summation, the rule may be stated to be that when sanctioned by legislative enactment, contracts which fix the price of re-sale are not invalid because of public policy. Thus, the way is pointed out to reach an end which has long been sought by manufacturers.

THOMAS DENNIS NOLAN

- QUESTIONS AND ANSWERS DEPARTMENT

The following questions are taken from cases presented in this issue, and from other cases of interest. All legal topics are included, and present a fair method by which you can test your own legal knowledge or that of others. Compare your answers with those given on Page 74 of this issue.

1. If a radio artist makes a phonograph record, does he acquire such a property interest in his performance as will entitled him to restrain the broadcasting of the record?

2. In an action for wrongful death, the defendant offers to prove that several hours after the accident the deceased said that the accident was the result of his own fault. Plaintiff objects on the ground that the action is for the benefit of the next of kin and not for the benefit of the deceased; therefore plaintiff (the executor) should not be bound by the declaration of the deceased. Is the evidence admissible?

3. What judicial decree of a state court will defeat the remedy afforded to creditor v. stockholder under §77B of Federal Bankruptcy Act

4. (a) Is evidence obtained by wire-tapping admissible in criminal cases in Federal District Court?
(b) Is it lawful for Securities & Exchange Commission to issue subpoena duces tecum to a telegraph company instructing it to produce all telegrams sent or received during a given period by X Company relating to a certain transaction?

5. B, a resident of New York, loaned paintings to a Pennsylvania museum, and died testate in New York while the pictures were on exhibition in Pennsylvania. A safe deposit box in a Pennsylvania bank contained cash, and United States bonds belonging to B. Was a Pennsylvania inheritance tax valid on (a) the paintings; (b) the cash; the United States bonds?

6. A's intestate was killed when he collided with the rear of B's truck, which was parked without lights. There are no surviving eyewitnesses. May A introduce evidence of the careful habits of deceased to show freedom from negligence?

7. A sells goods which bear A's trademark, to B under contract which provides that the goods will not be sold at less than a certain fixed price. B in turn sells the same goods to C under contract which does not limit the price at which C might re-sell the goods. C, however, knows of the provisions of contract between A and B. May A enjoin the re-sale by C at less than price stipulated in contract between A and I

8. A seeks to foreclose a mortgage on real property and he joins as party defendants B and C, the guarantors of the mortgage debt. They, claiming fraud and a change of the original mortgage, seek a jury trial on these issues. Will the court allow a jury trial?

COMMON LAW COPYRIGHT - LITERARY AND ARTISTIC PROPERTY - RIGHTS OF MUSICIANS IN MUSIC TRANSCRIBED ON PHONOGRAPH RECORDS - EFFECT OF SALE ON RIGHTS

A challenge to the vaunted genius of the common law to adapt itself to new social and industrial conditions and to the progress of science and invention was presented by the facts of a recent Pennsylvania case. A situation was presented which had never before confronted an American nor an English court. The established laws of copyright and the rules intended to protect literary and artistic works, provided no precedent for the situation, for until very recently no such situation could possibly have arisen. Just as the birth of the printing press made it necessary for equity to inaugurate a protection for intellectual and literary property, so the new creatures of science demanded that equity provide adequate protection for them and guard against injustice.

These new creatures are the radio, phonograph, and talking-picture, and the rights involved are those of the musicians and the actors who use these vehicles to express their art.

The property rights of authors in their plays, and of composers in their musical creations have always been secured from infringement at common law and by statute. The plays might be produced and the music played, but the authors and the composers were protected. As for the actor, once the play ended, his words and gestures were gone forever. Once the musicians' instruments were laid aside, the symphony's appealing harmonies were forever lost to the ear. There was never a need for protecting the very words and gestures of the actor, nor the intangible music of the artists as its vibrations left the instruments to be carried through the air to the audience. Such evanescent things, by their very nature, could not be stolen, for they were experienced for but a fleeting moment and then were irretrievably gone.

But science has given us the talking-picture, the phonograph, and the radio, and at once is created a new field for the operation of legal rights. With these devices the identical actions may be seen over and over again, the spoken words recalled at will, and the musical phrases played again and again. And just as an author deserves protection for the ideas he has embodied in an original work, so the musician and the actor acquire an interest in their interpretation of the music or the drama, which may be preserved by picture or recording. Never before were their rights in their actual act of portrayal of the work considered.

But such consideration was required in Waring v. WDAS Broadcasting Station, 194 Atlantic 631. Plaintiff there was leader of an orchestra well known to all radio listeners. Years ago his orchestr had made phonograph records of two songs, and these two records were broadcast by the defendant radio station as part of its sustaining program, after an announcement that they were recordings by plaintiff's orchestra. The plaintiff brought action to enjoin such broadcasts. When the records were made for the Victor Talking Machine Company, plaintiff had foreseen the possibility that the records might be used by broadcasting companies for reproduction over the radio. With this in mind, an agreement was made between the Victor Company and plaintiff that a label should be placed on the

records reading, "Not licensed for radio broadcast," and this label was on the records defendant bought from one of the Victor Company's dealers.

A very little thought will show what an unique situation was presented and how different it was from any which had arisen in connection with copyrights or rights to artistic works. The rights in this case were not protected by existing copyright laws which specifically provide what literary and artistic productions may be copyrighted and given the creator of such works as a right to protect them. Nowhere does the statute recognize any rights of a performing artist in his interpretive rendition of a musical composition. Thus, resort must be to the common law to determine whether the musician has any property rights in his performance.

Common-law rights in literary and artistic property existed long before statute. In modern times, copyright statutes have covered certain fields and created new rights therein. When they do this, they supersede the common law insofar as it applies to the topic covered. Holmes v. Hurst, 174 U.S.82. But fields untouched by statute are still governed by common law and the right of an author to exclusive use of his intellectual productions continues independent of copyright statutes. The problem in the Waring case was to ascertain whether plaintiff did have any rights in his musical interpretations and if so, whether these rights were lost or abandoned so as to relieve defendant of liability for the alleged infringement, and thereby to deny plaintiff any remedy to guard his artistic product against indiscriminate reproduction.

"At common law rights in a literary or artistic work were recognized on substantially the same basis as title to other property." Waring case, supra, p.634. Thus, the very obvious rights of dramatists, musicians, and authors to the use and publication of their works was guarded. Palmer v. DeWitt, 47 N.Y.532. These doctrines were extended to protect other artistic and literary creations such as paintings, etchings, sculpture, photographs, business reports, and news reports. Burrow Lithographic Co. v. Sarony, 111 U.S.53; Dodge Co. v. Construction Information Co., 183 Mass.62; Kiernan v. Manhattan Telegraph Co., 50 How.Pr. 194.

Such objects were entirely the original creations of the men whose rights were protected. But the law never considered it necessary for the establishment of property rights in intellectual or artistic productions that the entire ultimate product should be the work of a single creator. Such rights might be acquired by one who perfected the original work or substantially added to it in some manner. Arnstein v. Marks Music Co., 11 Fed.Supp.535. Thus, one who arranged the score of an opera for pianoforte was held to have a right of property apart from the composer. Wood v. Boosey, 2 L.R.Q.B.340; Carter v. Evans, 27 Fed.861. A newspaper report of a public address with a description of the meeting invested the reporter with property rights. Walter v. Lane, 1900 A.C.539. A translation of a novel or its dramatization gives a property right. Fleron v. Lackaye, 14 N.Y.Supp.292. A dramatic work even though composed of selections from compositions which were public property merited protection. Aronson v. Baker, 43 N.J.Eq.365, 12 Atl.177.

But there always was a difference between the creator or arranger of a work, and the performer of it, since for reasons noted, the performance itself could not be preserved. True, it could be imitated but such mimicry was not a piracy of the performance itself

as concerns us here. But with this possible by phonographs, the similarity between this situation and others where protection is granted obviously required some protection for the performer.

"A musical composition in itself is an incomplete work; the written page evidences only one of the creative acts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound. If, in so doing, he contributes something of novel, intellectual, or artistic value, he has undoubtedly participated in the creation of a product in which he is entitled to a right of property, which in no way overlaps or duplicates that of the author in the musical composition." Waring case, supra, p.635. The evidence in the Waring case indicated that plaintiff's orchestra measured up to this standard, not only in performance but in unique artistry, as nearly any radio fan will attest. Thus, plaintiff's interest was legally recognized.

In sustaining plaintiff's property interest here, the majority opinion emphasized the fact of contribution by the musicians to the enjoyment of the piece. As a pure legal proposition, an analysis of the nature and foundation of the bare rights here involved, would indicate that the plaintiff need not contribute anything unique to the composition. True, that would increase his damages were his property stolen. But the need for protection does not arise from any particular merit of plaintiff's performance. It is the performance itself which is protected, and not its value. The right originates in the performance and its value merely forms a measure of damages. Value is immaterial so long as there is a right capable of infringement. Woolsey v. Judd, 11 How.Pr.49. Where once no such thing was physically possible, a new device of science has made it so, and the newborn subject of legal rights must be provided for.

In a concurring opinion in the Waring case, Justice Maxey disagreed with the proposition that plaintiff's right to protection depends on a "novel and artistic creation which elevates interpretation to the realm of independent works of art." (p.642) He contends that any interpretation of a musical or any other kind of composition has an interest in his interpretation to which the law accords the status of a right and which it will protect. Citing Drone on the "Law of Copyright," he asserts, "the true test is whether the thing in question is capable of identification so that the exclusive ownership may be asserted." (Waring case, supra, p.642).

Attention must again be called to the nature of the thing being protected. The act which often constitutes an infringement of another's rights, here is the basis of a right. By "artistic interpretation" is meant the actual act of playing the composition. It does not mean a particular arrangement or alteration of the written notes on paper, which supports the recognized property right of an arranger or one adapting the music to a particular purpose and is based on entirely different grounds. It is granted that by merely copying a composition word for word, no right to control the playing of the piece could be based on this copy. But where the copier contributes ideas of his own and indicates novel methods of treatment, he has a right to protect these original ideas as expressed in his arrangement. Just as this man can call the particular arrangement his, so plaintiff may claim as his the notes which issue from the phonograph, regardless of their beauty or quality.

Since the Waring case established a right in the plaintiff it was necessary to determine whether he had lost this right. It has been noted that statute gave him no protection, and that he must find his remedy in the common law. At common law, copyright gives the exclusive right to make the first publication. Palmer v. DeWitt, supra. This common law right applies only to unpublished works and is perpetual until lost by publication or dedication to the public, Caliga v. Inter-Ocean Newspaper, 215 U.S.182. In England it is held that publication does not defeat the right of proprietorship at common law, but in America the common law right is confined to the first publication. Jewelers Mer. Agency v. Jewelers Pub. Co., 155 N.Y.241; Wright v. Eisle, 86 A.D.356; Bamforth v. Douglas Postcard Co., 158 Fed.355. Thereafter, unless copyrighted under statute, no protection is afforded the author, for by common law, he lost his rights upon publication. Any rights he might thereafter enjoy must be created by statute.

But the law has consistently distinguished between a general publication and a limited publication. Whenever a work is published generally and without restriction, as by printing and selling to the public, all common law rights terminate. Wright v. Eisle, supra. But there may also be a limited publication, whereupon the limitations determine the author's rights. Dodge v. Comstock, 140 Misc.105; Kiernan v. Manhattan Tel.Co., supra; Ferris v. Frohman, 223 U.S.424. "In determining whether or not there has been such a publication, the courts look partly to the objective character of the dissemination and partly to the proprietor's intent in regard to the relinquishment of his property rights....When the communication is to a select number upon conditions, express or implied, that it is not intended to be thereafter common property, the publication is then said to be limited." Waring case, p.636.

"A person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals, or a limited, ascertained class, or he may expressly or by implication, confine the enjoyment of such rights to some occasion or definite purpose... No rights inconsistent with or adverse to such restrictions are surrendered. Restrictions placed upon the use prior to publication protect the copyright." Werchmeister v. American Lithographic Co., 134 Fed.321. Thus, permission to act a play at a public theatre does not amount to an abandonment of title, nor a dedication of title, Ferris v. Frohman, supra.

The question in the Waring case was whether the label on the record reading, "Not licensed for broadcast," made the sale a limited publication. Many early cases held that once a general publication occurs, it cannot properly be limited by restrictions or reservations. These cases rested on an assumed doctrine that restrictions and servitudes cannot be judicially recognized when imposed as conditions attaching to the sale of chattels. The most common type of restriction was the attempt to fix resale price. Bobbs Merrill Co. v. Strauss, 210 U.S.339. Others related to the use of the article after sale. Jewelers Merc. Agency v. Jewelers Weekly Pub. Co.,

However, an analysis of these cases indicates that they depend essentially on the fact that the attempted restrictions being in restraint of trade were against public policy. In other cases the rights sought to be reserved after publication could have been reserved by copyright, so there was no real need for equitable relief.

However, even in the past, the courts have enforced restrictive covenants and conditions accompanying the alienation of chattels, and the recent case of Old Dearborn Distributing Co. v. Seagrams Distillers Corp., 299 U.S.183, upheld the fixing of the resale price. On the whole, "the tendency in the United States has been to apply the doctrine of restrictive covenants to personal property when not regarded as an unlawful restraint of trade or in violation of public policy." Harlan F. Stone, "The Equitable Rights and Liabilities of Strangers to a Contract," 18 Columbia Law Review, 291 at 310.

This last statement seems to summarize the law applicable to the restriction in the Waring case. The court there held that the restriction was not unreasonable as in restraint of trade, but had a legitimate purpose. The reason for the ancient rule forbidding it has ceased to exist and hence there should be no bar to the restrictions which new scientific inventions make highly desirable. "Uses of the records on phonographs and for broadcasting purposes are so radically distinct as to belong practically to two totally different fields of operation," Waring case p.638. The facts clearly indicate that there was here "a dedication of them only to purchasers for use of the records on phonographs, and not to competitive interests to profit therefrom at plaintiff's expense." (p.640). If defendant can flood the air with recordings made by the plaintiff, and especially with old records from a time when perhaps the orchestra had not attained to its present high degree of excellence, and thereby injure plaintiff and detract from his public appeal, then plaintiff would be unable to receive the high prices he now receives for his services. Certainly the right to restrict the use of these discs to private use was proper to prevent such an injury and the court held that equity would enforce the restriction.

While there were other considerations justifying the result in the Waring case, cogent reasons for denying such relief could be presented. While analogies to common law copyright and general considerations of unfair competition and protection of one's right of privacy brought about an equitable result in this case, the rights of performers and musicians under new methods of perpetuating their work are eminently matters for considered legislation and Congress should prescribe legislation as to their rights in this new and neglected field of jurisprudence.

ARNOLD GOODWIN CHAPMAN, JR.

EVIDENCE OF HABIT

WRONGFUL DEATH ACTIONS - RES INTER ALIOS ACTA

Knowledge of the ordinary habits of an individual makes it easy for us to infer what that individual would probably do when confronted with any particular set of facts or circumstances requiring action on his part. In other words, we come to expect of an individual, certain definite reactions, especially when we know what he has done under similar circumstances in the past. To the student of the law of evidence, however, it is well known that proof of habit is not usually favored. The reason for such a policy is well founded. In the ordinary case the admission of such evidence would tend to introduce collateral matter that would greatly impede the progress of the trial and result only in confusing the jury. The true point at issue - how the parties acted at the particular time involved - would be lost in a maze of proof of how they usually acted.

In actions for wrongful death we quite often find that there were no witnesses to the accident, or that the defendant was the only witness. Since negligence must be shown on the part of the defendant and the plaintiff must also show that the deceased was free from negligence, it is easy to see that the plaintiff might sometimes be deprived of a remedy because he has no one to testify. Practically speaking, he has to remove what amounts to a presumption of negligence before he can recover. Some states will allow the habits of the deceased to be shown under such conditions.

The recent case of Nordman v. Carlson (10 N.E.(2d)53) illustrate the rule in Illinois on this point. The action was brought by the administratrix against a motorist to recover for the alleged wrongful death of her intestate. There was no living eye-witness to the accident except the defendant himself. The court, after incidentally deciding that since Illinois law prevented the defendant from testifying in his own behalf the plaintiff was not obliged to use him as a witness for her side either, came to a discussion of whether the plaintiff should be allowed to prove the habits of the deceased. It was stated that "when it developed upon the hearing that the defendan was the only surviving eye-witness and plaintiff did not desire to avail herself of the privilege of using him for a witness, the trial court did not err in ruling that the habits of the deceased might be shown." Another Illinois case was distinguished - Micca v. Alton R.R.Co., 281 Ill.App.216. "It appeared in the Micca case that there was an eye-witness to the accident and this court sustained the ruling of the trial court and held that evidence of the cautious habits of the deceased was incompetent where there is an eye-witness to the accident." Thus Illinois, while realizing the weakness of 'habit' evidence, does give it some efficacy where it appears that no other evidence is available.

The New York rule seems to be quite definitely determined. In Zucker v. Whitridge, 205 N.Y.50, plaintiff's intestate was struck by one of defendant's trolley cars and was fatally injured. The trial court allowed a witness, who had known the decedent for eight years, to state what his usual manner of crossing railroad tracks was while in the company of the witness. Vann, J., discussed the rule as found in various states. In his opinion, based on the cases cited, he found that New Hampshire, California, Kansas, and Illinois were among

those States which admitted such evidence. Wisconsin, Pennsylvania, Connecticut, Iowa, Maine, and Massachusetts seemed to generally consider it incompetent. Following the latter rule the court decided that, "Habit is an inference from many acts, each of which presents an issue to be tried and necessarily involves direct and naturally invites cross-examination. The circumstances surrounding each act present another issue, and thus many collateral issues would be involved which would not only consume much time, but would tend to distract the jury and lead them away from the main issue to be decided."

There were eye-witnesses in the Zucker case. But another case in the same volume, Parsons v. Syracuse B.& N.Y.RR.Co., (205 N.Y.226) adopted the same rule where there were no such witnesses. It was held, "A jury cannot be permitted to find that a decedent did look and listen for the engine, and thereby exercised care and caution in approaching the crossing,where there is simply the testimony in general terms that the decedent was a man of prudent character, well acquainted with the crossing, and that a few moments before the accident he was conducting himself and managing his horse in a careful, prudent manner." Zucker v. Whitridge was expressly followed.

The rule is the same in industrial accident cases. (Gibson v. Casein Mfg. Co., (141 N.Y.Supp.887, 157 A.D.46). Plaintiff's intestate was fatally injured while working around machinery in the defendant's factory. There was no eye-witness to the accident and plaintiff was permitted to prove, over defendant's objection, that the intestate was an ordinarily cautious man when employed around various kinds of machinery. The Appellate Division reversed on the ground that the opinion of a friendly witness that at times before the accident the deceased had exercised ordinary caution, was no evidence of what occurred at the time of the accident. (Smith,P.J., dissented).

More recently the rule was followed in Murphy v. Stanley Court Realty & Construction Co., 206 N.Y.Supp.663, 211 A.D.26. Plaintiff's intestate was killed when he fell down an elevator shaft. There was no direct evidence as to how the accident happened. The elevator operator testified that he had closed the door of the shaft when he let plaintiff's intestate out. On his return trip down he discovered the door open. Later the body of the intestate was found at the bottom of the shaft. Plaintiff tried to show that the intestate was a careful man. The evidence was not admitted.

No cases allowing such evidence, as proof of freedom from negligence, are to be found in the New York reports. "In many cases, fact which are offered as the basis of an inference as to the existence of another fact solely from similarity, are irrelevant and can be rejected on that ground. But even where they may seem to have some probative value as a practical matter, the tendency is to exclude them, especially if there is other and more satisfactory evidence."(3 Ford, Evidence,1392 §247-a "Res Inter Alios Acta").

Two cases containing very similar facts, and decided within recent years, illustrate the difference of opinion found in many state courts.

Tresise v. Ashdown, 160 N.E.898, indicates that Ohio follows the New York rule. In an action to recover damages for the death of the decedent it appeared that he ran his motorcycle into the back of defendant's car which was parked without lights. There being no eye-

witness to the accident, plaintiff offered evidence tending to prove that decedent's habit and custom was to be careful in driving his motorcycle. The court held that evidence of conduct upon other occasions, or the manner of driving generally, was properly rejected and cited other Ohio authorities in conformity with such a stand.

Boone v. Bank of America Nat. Trust & Savings Ass'n, (29 Pac.(2d) 409) is a California authority in favor of the Illinois rule. (Nordman v. Carlson, supra). Under facts practically identical with the Tresise case, ante, a motorcycle collided with the rear of an unlighted wagon; it was stated, "The rule now appears to be crystallized in this State that evidence of habit.....is admissible when there are no eye-witnesses to an accident, and where the evidence is not too remote as to time and is limited to habit at the approximate place of the accident and under circumstances substantially similar to those in controversy."

Needless to say, with so much authority on both sides, neither rule can be condemned. The value of 'habit' testimony is probably slight at best. The weight it is to be given is, of course, for the jury. Able cross-examination and adverse witnesses can usually refute, to a great extent, any evidence of careful habits that is offered. The case is weak indeed that must rely on such evidence to prove freedom from negligence.

FRANK SEYMOUR HIGGINS

IN SUPPORT OF DISSENTING OPINION

IN CHICAGO TITLE & TRUST COMPANY v. FORTY-ONE

THIRTY-SIX WILCOX BLDG CORP., U.S. 82 L.Ed.109

Defendant in error was organized under the laws of Illinois and pursuant to a statute of that State was dissolved by decree of Superior Court of Cook County in the State of Illinois. Subsequent to that date two mortgages and certain mechanics' liens had been foreclosed. Equity receivers were in possession at the time this petition was filed under §77B of Bankruptcy Act on June 13, 1935. The Illinois statute provides that all corporations whose powers may have expired by limitation or otherwise shall continue their corporate capacity for two years only for purposes of collecting debts due such corporation and selling and conveying the property and effects thereof. The question is whether the corporation dissolved under the Illinois statute can be revived by the Federal Court under the Bankruptcy Act.

The majority of the court argue and hold through an opinion written by Mr. Justice Sutherland that - "How long and upon what terms a state created corporation may continue to exist is a matter exclusively of state power." And further it declares that the Federal Government "cannot breathe life into a corporate entity when put to death by the state in the lawful exercise of its sovereign authority." However, in the adoption of the word "death" the court accepts as a legal truth an hypothesis which is without complete legal justification and summarily strikes almost a death blow to the very section (77B). And further, the attitude of the majority of the court appears to be distinctly out of harmonywith its stand in the case Continental Ill.N.B.&T.Co. v. Canadian Rock Island & Pacific, 294 U.S.648, 79 L.Ed.1110, 55 S.Ct.595, wherein the court stated, also through Mr. Justice Sutherland, "From the beginning the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The majority of the court argue that the corporation is dead and that corporate death inevitably followed the expiration of the two-year period following the decree of dissolution. This conclusion is based on the Illinois statute (Smith-Hurd Rev.Stat. 1929 Chap.32). Yet as Mr. Justice Cardozo points out, "Nonetheless the corporation still had the power if suits were then pending either in its favor or against it to litigate in its corporate name and through its corporate officials." And further - the respondent - petitioner was actually under the jurisdiction of the Illinois. courts for the purposes of foreclosure of liens against the corporate property. A receiver held this property under jurisdiction of the Illinois courts. It made no difference under the law of the State of Illinoi how long such an action was pending. See Commercial Loan & Trust C v. Mallers, 242 Ill.50, 89 N.E.661, 134 Am.St.Rep.306. Judge Cardozo further argues, "It is not within the competence of Illinois b any form of words to preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of Federal law."

Any holding to the contrary severely curbs the supremacy of Federal authority in the field of bankruptcy. While it is true

that the corporation is the creature of the state and its birth is not in any way a Federal question, as soon as it comes into being it must immediately come under the contingency of the operation of the Federal bankruptcy power. Neither the state that created it nor the corporation itself can resist the jurisdiction of the Federal Government should its financial situation become such that bankruptcy procedure provides remedy for its creditors and shareholders. It must yield to the exercise of this Federal power. Therefore it seems quite apparent that the premise upon which majority opinion is founded -- that "there is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state created corporation if that be authorized by the statute under which the corporation is organized -- is a denial of the bankruptcy power itself.

The authority to terminate a corporation must of necessity be subject to the Bankruptcy Act. Dissolution through process of state court should not and undoubtedly cannot defeat the rights of creditors who petition the Federal courts for a remedy through bankruptcy proceedings. If the Federal courts have the power to entertain such a proceeding, why does it not follow that the expansion and liberalization of bankruptcy proceedings as embodied in §77B must of legal and practical necessity include the corporate reorganization here sought as well as liquidation under the Bankruptcy Act prior to its amendment? The old form of bankruptcy had as its purpose liquidation only. The bankruptcy power vested in the Federal Government has been expanded toward a more flexible procedure to enable a reorganization of the subject corporation without the incumbent hardships and evils of complete disintegration. That the section itself is constitutional is not denied by the majority opinion. See Commercial Loan & Trust Co. v. Chicago R.I.& P., supra. In re Georgian Hotel Corp., 82 Fed.(2d) 917 - certiorari denied. Allen v. Georgian Hotel Corp., 298 U.S.673, 80 L.Ed.1395.

If the United States Supreme Court denies the petitioner the right to reorganize here, then it has the tendency at least, if not the complete effect, of enabling the state to decree a corporation dead and thereby rendering the subject matter forever immune from bankruptcy proceedings. This, of course, works no hardship where the petition is brought in bad faith. But good faith is prerequisite to the entertainment of jurisdiction in bankruptcy. And here the Master found that the petition was brought in good faith. The penalty exacted by the State of Illinois of the corporation in question for failure to pay franchise taxes and file annual reports was dissolution. Should the exaction of such a penalty defeat a reorganization under §77B and the efficacy of the Bankruptcy Act in general?

I think the majority of the court would not question the proposition that dissolution by state decree cannot defeat the jurisdiction of the Federal court under the old form of bankruptcy. Section 77B is merely a more flexible procedure - a reformation of the old form deriving its strength and validity from the bankruptcy power itself. If that power lies dormant, yet available to suitors upon petition in the situation here presented, how can the court hold that the reformed remedy, efficient only through this very power not denied, is not here available? If such a power does not exist it should not be crippled by erecting arbitrary barriers to its exercise founded on a decree of a state court that keeps the corporation alive to permit the operation of a foreclosure but denies its existence for a reorganization. Such an inconsistency can be justified

only as a protective bar in the prevention of a fraud. And the Federal courts themselves are competent and rightly so to hear the petition of the corporation and inquire into the bona fides of that petition. The dissenters to Mr. Justice Sutherland's opinion are ready to deny the new remedy of §77B when it is invoked to perpetrate a fraud. But the inquiry on this question should move from that sovereign in whom the people of the United States have vested the bankruptcy power. It should not be curbed by a state tribunal nor the application of a state statute.

If in the wisdom of Congress the bankruptcy procedure is reformed and the bankruptcy power expanded constitutionally, it should not be denied by withdrawing from the scope of its operation on the subject matter upon which it was designed to achieve a result. As long as there remains a fragment of corporate entity there must be in legal truth rights and liabilities attached thereto. If the State of Illinois has preserved that fragment to litigate the rights of one creditor, in the present case mortgagees, it should not deny its existence as to other rights -- that is, rights vested in other groups which have emanated from the very corporation sought to be recognized. So long as that spark of corporate existence is not completely extinguished the Federal bankruptcy power should prevail. Section 77B was designed to afford a remedy to those who had an interest in its life, to keep it alive, to repair the weakened corporate structure without suffering the formal penalty of death.

If we are not to deny the supremacy of the Federal bankruptcy power and the necessity for a reformation of the severe abuses and penalties inherent in the financial death of a corporation, we must adhere to the logic of Mr. Justice Cardozo.

JAMES STUART HOLDEN

N O T E S

EVIDENCE - ACTION FOR WRONGFUL DEATH- DECLARATIONS OF DECEASED BINDING ON EXECUTOR.- The recent case of Kwiatkowski v. Lowry, Inc., 276 N.Y.126, was an action for wrongful death brought by an executor. On the trial of the action the defendant offered to prove statements of the decedent to the effect that the accident claimed to be the cause of the injury never happened and that the injury was caused by a different occurrence due to decedent's own fault. These statements were both oral and written and were made after the accident. The plaintiff objected to the admission of the evidence on the ground that the statements, not being part of the res gestae, were not admissible under §130 of the Decedent Estate Law. (the section which creates the cause of action for wrongful death). The trial court excluded the evidence and on appeal to the Appellate Division, the ruling was held proper.

The question whether such declarations are admissible against an executor has never been decided by the Court of Appeals. There is however, an old case decided by the New York Superior Court in 1880 which held that such declarations are admissible as admissions against interest. (Lax v. Forty-second & G.S.F.R.R.Co., 14 Jones & Spencer 448). As a matter of strict logic, however, such declaration are not admissions against interest because the action for wrongful death is given, not for the benefit of the deceased, but rather for the benefit of the surviving wife, husband, or next of kin. It would seem, therefore, that the statements of the deceased should not be binding on the executor who really represents the next of kin in the action. In some states such declarations have been excluded on the ground that no privity exists between the executor and the deceased. Other states have held that privity does exist and there such declarations are received against interest. In Massachusetts the declarations of the deceased are received where the action is brought for the benefit of the deceased and excluded where the action is brought for the benefit of the next of kin.

The Court of Appeals, however, based its decision on the intent of the Legislature as expressed in §§130, 119, and 120 of the Decedent Estate Law, rather than on the ground of privity. Though the action under §130 is for the benefit of the next of kin, the Court points out that the executor can recover only in case the deceased could have recovered in his lifetime. It therefore follows that "admission which would bar the injured man's recovery may be given in defense the same as evidence of contributory evidence or of settlement and release." (p.129).

Sections 119 and 120 furnish further support for the admission of the deceased's declarations even against the executor. The former section permits the executor or administrator to bring an action for the injuries and expenses sustained by the deceased in his lifetime. This is for the benefit of the estate, and the damages are limited to the damages and expenses which he sustained. This action is not to be confused with the action for wrongful death given by §130. The latter is for the benefit of the next of kin, while the former is for the benefit of the deceased's estate, and in substance provides for the survival of the action for pain and suffering which the deceased had during his lifetime. Therefore, in this personal injury action statements of the deceased are really against his own interest and are admissible as exceptions to the hearsay rule.

Add to this the fact that §120 permits the consolidation of the action for wrongful death (under §130) and the action for personal injuries suffered before death (under §110) and we have the strongest indication of the Legislature's intention that such declarations be received against the executor. Consolidation means that the actions are to be tried together as one action. Since, in the action under § §119, the declarations are admissible as statements against interest, they necessarily become admissible in the action for wrongful death; for it would be impossible, as a practical proposition, to admit these declarations as to one cause of action and exclude them as to the other when both actions are being tried together. Thus the declarations of the deceased become, by legislative intent, transformed into declarations against the interest of the executor who represents the next of kin of the deceased.

J. W.

* * * * *

RIGHT TO JURY TRIAL - MORTGAGE FORECLOSURE.- The ever-important question of the right to a jury trial, where both legal and equitable relief are sought in the same action, has arisen again in the case of Jamaica Savings Bank v. M.S.Investing Co.,Inc., 274 N.Y.215. It may seem strange that in this our advanced stage of legal procedure such a controversy, so seemingly fundamental, should be the subject of litigation. It remains, however, a quite difficult and a very interesting problem which in the present case has divided the Court of Appea - a majority - four judges believing that under the facts here presented, the right to a jury trial did not exist.

In this action to foreclose a mortgage on real property, judgment for a deficiency was demanded against the defendants who guaranteed payment of the mortgage debt. They alleged in their answer, tha the time of payment of the mortgage was extended and its terms varie without their consent and asked for a jury trial on the issue of fac

The general rule, simply stated, is that an action to foreclose a mortgage, being an equitable action, does not entitle a party to a jury trial. Prior to the New York Revised Statutes (1830) a mortgagee was required to pursue his remedy in equity on the mortgage bu to enforce the bond, the action was at law and thus, in the latter a tion there was a right to a jury trial. Dunkley v. Van Buren, 3 Joh Ch.330. A change was effected by the New York Revised Statutes (183 which reads, "If the mortgaged premises should prove insufficient to satisfy the debt, the court of chancery has the power to direct the payment, by the mortgagor, of the unsatisfied balance, and to enforc it by execution against either property or the person of the debtor. The Court from an interpretation of this statute decided that no right to a jury trial existed. They reasoned that the main relief sought was the foreclosure, and the deficiency judgment which was demanded was merely incidental. This being so, the gist of the action was legal and so a jury trial was not a matter of right.

A view of the New York authorities reveals first the case of Knickerbocker Ice Co. v. Nelson, 8 Hun 21. This was also an action to foreclose real property mortgages and the mortgagor and guarantors were joined as parties defendant. Defendants demanded a jury trial to determine the questions of fact raised by their defenses of fraud and usury. The court decided that the cause of action was in equity and there was no right to a jury trial. This case is directly in point with the case here considered.

The courts have consistently held that an action to foreclose a mortgage, even though a deficiency judgment was demanded, is not an action to recover the mortgage personally but rather to collect lien. Dudley v. Congregation of St. Francis, 138 N.Y.483. And again, "This is not a distinct cause of action, but merely an incidental remedy, dependent wholly on the statute and subsidiary to the main object of the action, namely to enforce the mortgage lien." Richert v. Stilwel 172 N.Y.885.

Yet, say the minority, conceding that the deficiency judgment is incidental, if we construe the statute as does the majority, the defendant is deprived of a constitutional right. They reason, the action on the bond, before 1821, was strictly a legal action, entitling the parties to a jury trial. In 1821 the Constitution provided, "The trial by jury where it has been heretofore used shall remain inviolate forever." N.Y.Const.Art.I §2. Then, if one is to construe the statute of 1830 to mean that if plaintiff joins with his action to foreclose a demand for a deficiency judgment defendant's right to a jury trial as to the latter is lost, then it is a deprivation prohibited by Art.I §2.

The reasoning of the minority, as a matter of strict logic, seem to be incontestable. If before the adoption of the Constitution the right to a jury trial existed in this action, then the Constitution protected the right, and subsequently the Legislature passed a statute which merged the law action into the equity action depriving defendant of a jury trial, it is difficult to see how such can be sai to be constitutional. It seems to me, however, though the minority view is quite convincing, that the weightier argument is presented by the majority. They reason as follows: - if the plaintiff did not ask for a deficiency judgment but merely brought a foreclosure actior the judge, without a jury, might determine if the lien was valid and subsisting. He might determine what amount was paid or unpaid, the rights of paramount or subordinate lienors and whatever other questions of fact which might arise. It is then within his power to direct a sale, by the sheriff of the mortgaged premises and it is not until this point in the procedure that the question of a deficiency might arise. From this point all that remains is a process of subtracting the amount realized from the sale from the amount of the debt. Would one say such was sufficient to require a jury? If not, then why should a demand for a deficiency judgment, when the judge has such powers when no demand is made, require this change of procedure? The majority says it does not.

Whichever argument appeals to the particular mind, it matters not now as a matter of practice. The rule has been settled that a defendant may not claim the right to a jury trial whether he is mortgagor or guarantor of the mortgage debt. The equitable action to foreclose is the gist of the action and the legal demand is merely incidental.

H. S. C., Jr.

* * * * * *

§605 OF THE FEDERAL COMMUNICATIONS ACT OF 1934.- Section 605 of the Federal Communications Act of 1934 provides that no person, who as an employee, has to do with sending or receiving of any interstate communi cation by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to an authorized fellow employee, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful autho

ty; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, nor meaning of such intercepted communication to any person.

The Federal Courts in two opinions recently handed down, have interpreted this section. The Circuit Court of Appeals, Fifth Circuit, in Newfield v. Ryan, 91 Fed.(2d) 700, decided that the issuance of subpoenas duces tecum by the Securities and Exchange Commission to telegraph companies to produce all telegrams sent or received by a Florida oil company which refer to or mention a certain transaction was lawful under the provision. While in Nardone v. United States, 56 S.Ct.275, the Supreme Court held that evidence procured by a Federal officer tapping telephone wires and intercepting the message is inadmissible in a criminal trial in a United States District Court Each opinion discussed the question whether the practice in question was violative of the Fourth and the Fifth Amendments in that it purported to compel persons to be witnesses against themselves; it purported to authorize general, and therefore unreasonable searches and seizures. Neither case decided that any right of privacy was violated. Both were decided on an interpretation of the language of the section itself.

The Newfield v. Ryan case decided that the subpoenas were issued "on demand of other lawful authority." Also that the subpoenas were directed to the telegraph companies, which are common carriers and subject to Federal regulation, and that there is no demand on the Oil Company to produce evidence or testify against themselves. Neither are they subject to a search and seizure, reasonable nor unreasonable, nor to their person nor their property. The Commissioners in their demand are about their lawful business. They, acting under the authority of a valid law, and for a public purpose, are lawfully demanding an inspection of files of the telegraph company. The subpoenas were limited to a reasonable period of time and definite and limited to persons and corporations under investigation and to the scheme being investigated. Under §605, in the opinion of the Court, there could be no question as to the authority of the Securities and Exchange Commission to issue these subpoenas duces tecum.

The Supreme Court in the Nardone case interpreted the provision of the section which relates to intercepting the messages by wire-tapping. Justice Roberts writing the majority opinion said, "Taken at its face value the phrase 'no person' comprehends Federal agents and the ban on communication to 'any person' bars testimony to the content of an intercepted message." Before the passage of the Communications Act evidence procured by wire-tapping was admissible at common law. Olmstead v. United States, 277 U.S.438. But Justice Roberts said, "We, nevertheless, face the fact that the plain words of §605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person.' To recite the contents of the message in testimony before a court is to divulge the message."

It is clear that the Supreme Court in holding that such evidence was inadmissible, which had been held admissible in prior decisions, was not overruling these prior decisions on constitutional grounds but because their interpretation of the section gave them no other choice. They construed the section as absolutely prohibiting anyone from divulging at any time or place messages intercepted by wire-tapping. Justice Roberts, in discussing the possible forces

that motivated Congress in passing the section said, "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberties. The same consideration may well have moved Congress to adopt §605 or evoked the guaranty against practices and procedures violative of privacy embodied in the Fourth and Fifth Amendments of the Constitution."

Justice Sutherland wrote a dissenting opinion in which he disagreed with the majority interpretation of the words "no persons." He stated, "I think the word 'person' used in the statute does not include an officer of the Federal Government actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States, who has good reason to believe that a telephone is being, or is about to be, used as an aid to the commission or concealment of a crime." The majority admitted that in some instances the general words of a statute do not include the Government where the Act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest. Second: where public officers are impliedly excluded or where a reading which would include such officers would work an obvious absurdity as for example the application of a speed law to a policemen pursuing a criminal. But because the practice of wire-tapping has been the subject of much criticism and been viewed by many as a great wrong, the majority followed the principle that the sovereign embraced by general words of a statute intended to prevent injury and wrong.

The dissent attacks this construction on the basis that there has been too much coddling of the criminal, and too many impediments placed in the path of justice. It is hard to deny the logic of their argument. Justice Sutherland sums up his position thus, "In view of the safeguards against abuse of power furnished by order of the Attorney-General, and in light of the deadly conflict constantly being waged between the force of law and order and the desperate criminals who infest the land, we may well pause to consider whether the rule which forbids an invasion of the privacy of telephone communication is not being carried to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality."

Regardless of our views as to the correctness of the Court's interpretation, both the Nardone case and the Newfield case were decided strictly on the language of §605. The decisions involve statutory construction and not constitutional principles. Justice Roberts in the Nardone case distinguishes the two cases as follows: "Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employees of the carrier. The former may not divulge to any person, the latter may be divulged in answer to a lawful subpoena."

J.D.S.

ANSWERS

1. Yes. Waring v. WDAS Broadcasting Co., 194 Atl. 631. Law Review, p. 58.

2. Yes. Kwaitkowski v. Lowry Inc., 276 N.Y.126. Law Review, p. 69.

3. Decree of corporate dissolution prior to petition, §77B. Chicago Title & Trust Co. v. 4136 Wilcox Bldg.Corp., 82 L.Ed.109. Law Review, p.66.

4. (a) No. Nardone v. U.S., 56 S.Ct.275.
(b) Yes. Newfield v. Ryan, 91 Fed. (2d) 700.
Law Review, p.71.

5. (a) Yes. City Bank v. Schnader, 293 U.S.112.
(b) Yes; no. Blodgett v. Silberman, 277 U.S.1.

6. In New York, no; in some states, yes.
(Yes, Nordman v. Carlson, 10 N.E.(2d)53; No, Zucker v. Whitridge, 205 N.Y.50.) Law Review, p. 63.

7. Held, Yes. Bourjois Sales Corp. v. Dorfman, 273 N.Y.167. Law Review, p.70.

8. No. Jamaica Savings Bank v. M.S.Investing Co., 274 N.Y.215. Law Review, p. 70.

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CONTRACTS - CONTRACTUAL RIGHTS OF THIRD PERSONS NOT PARTIES TO THE CONTRACT - LAWRENCE V. FOX EXTENDED

A recent Arkansas case, Freer v. Putnam Funeral Home, 111 S.W.2d 465, provokes the highly interesting question as to how far courts have gone in sustaining the right of a third party donee beneficiary to maintain an action upon a contract to which he was not a party in the absence of privity between the promisee and the beneficiary.

This case involved an action by an undertaker (beneficiary) against a grantee of real property (promisor) upon the latter's promise to the grantor (promisee) to pay the balance due of the purchase price on the funeral expense of the grantor. Upon the death of the grantor, his son delivered the contract to the undertaker who provided the appropriate funeral. The court, in an unanimous opinion, permitted the plaintiff to recover, indicating that the only controversial question involved was as to which person the parties intended to directly benefit. This they resolved in favor of the undertaker by asserting that the language was susceptible to but one interpretation, that the grantor did not intend that the money should go to his administrator and thus compel the funeral debt to share in the net assets with the other claims against the estate; but that he contracted with the intent that his undertaker be paid directly.

The idea, that one granting property intended that an unknown and unidentified undertaker should be directly benefited, is rather absurd The real purpose of the contract, more consonant with reason, was to benefit directly the estate of the promisee - any advantage accruing to the undertaker being merely incidental. Thus the undertaker should not have been permitted to sue as not being the real party in interest In Morgan v. Ebco Machine Co., (239 A.D.346) the general rule was stated that where a contract contains nothing either expressly or by implication which might be construed as a grant of a benefit to a third person, such third person cannot sue thereon, and the mere fact that services similar to that usually rendered by such third person will be required in a successful execution of the contract will not alter the situation.

The important point in the Arkansas case, however, so far as this discussion is concerned, is, that once having ascertained that the parties intended directly to benefit a third person, there was no doubt in the mind of the court as to the right of the third person to maintain the action regardless of any privity existing between the promisee and the beneficiary. The following statement from the case flatly and plainly denies either the necessity or the efficacy for the so-called New York rule relating to such situations.

Baker, J., said: "We are confronted with the argument that formerly the courts held that there must have been some privity or obligation as between Finney (promisee) and the appellee (undertaker beneficiary) in order to bind appellant (promisor); that none being shown here the appellee is without remedy. We find that formerly under some of the more ancient authorities that a proposition might have been deemed well considered. We prefer, however, to take a different view, which we think is more consonant with absolute justice, as well as in conformity with the contract. That view is supported by a substantial array of authorities to the effect that the more nearly absolute becomes the duty of the defendant to pay, in the same proportion is the power to sue increased. Here there is an absolute

duty to pay. It admits no denial and none is offered There is the correspondingly increased right to sue." (id.465).

This brings us to the real quest of this article, whether New York courts require a privity or a relationship - moral obligation or duty - existing between the promisee and the beneficiary. The fountain of authority for the rights of third persons both in New York and elsewhere has been the case of Lawrence v. Fox,(20 N.Y.268). We will attempt to trace briefly the subsequent history of the growth of this doctrine with special emphasis upon donee beneficiary contracts, endeavoring to treat the cases analytically in the light of criticism by such authorities as Williston on Contracts, and Page on Contracts.

Contracts for the benefit of third persons have been the prolific source of academic and judicial discussion. Law journals and annotations to cases abound with various ramifications of this subject. To treat the application of the many rules in other jurisdictions would transcend the scope of this article. There is a terse but excellent annotation to Carson Pirie Scott Co. v. Parcett, 81 A.L.R.1262, which contains a summary of the foreign cases and includes a treatment of the basic philosophy of the subject.

Before Lawrence v. Fox was decided, there was a great deal of confusion concerning such actions and to appreciate the difficulties which confronted the courts, it is essential to bear in mind the general rule that no one but the parties to a contract can be bound by it nor acquire rights under it. Usually, therefore, the legal relations of third persons cannot be affected by a contract arising from the acts of others.

A clearer understanding of the following cases will be had if the two propositions inherent in third party contracts are distinguished and kept separate. The first is that the original contract must be one for the direct benefit of the beneficiary and not merely incidental to an advantage intended to be obtained by the promisee. The second has been an outgrowth of dictum to cases which have really turned on a determination of the first - that there must be found a privity or relationship between the promisee and the beneficiary creating a duty or moral obligation owing from the former to the latter. The present status of the requirement of the second in New York is the problem of this article. To analyze the development of this topic, a brief treatment of direct and incidental benefits is essential.

New York has been conservative in interpreting contracts in favor of third persons. The general rule may be stated to be that to entitle a third person to recover it is necessary that the contract should have been entered into for his benefit, and if it appears from the terms that the contract was solely for the benefit of the parties thereto, third persons cannot recover.

In denying the rights of an inhabitant to sue for breach of a contract made by a city with a water company to supply water to fire hydrants, Judge Cardozo said: "The benefit must be one that is not merely incidental and secondary. It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of the duty to make reparation directly to the individual members of the public if the benefit is lost. The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability. A promisor undertakes to supply

fuel for heating a building. He is not liable for breach of contract to a visitor who finds the building without fuel and contracts a cold." (Moch v. Rensselaer Water Co., 247 N.Y.160, 164.)

In most cases announcing the necessity of a duty or obligation owing from the promisee to the beneficiary, the real obstacle to a recovery by the third party was that the contract was not intended for his benefit or did not cover his claim. It was just such dictum, repeatedly reasserted, that circumscribed and limited the broad salutary principles laid down in the case of Lawrence v. Fox, and imbedded in the law of New York the idea that a relationship between promisee and beneficiary was an indispensable prerequisite to recovery by the latter.

Lawrence v. Fox held that where A being indebted to B, promised B to pay the debt to C, to whom B was already indebted, C might enforce A's promise to B though he was not a party to the contract. Here there was an existing indebtedness between the promisee, B, and the third person, C, so that A's performance of his promise operated as a satisfaction of that debt.

Thus was created the right of action by a third person in the most important type of third party contracts - "where there is a pecuniary obligation running from the promisee to the beneficiary, i.e., a legal right founded on some obligation in the third party to adopt and claim the promise as made for his benefit." Seavor v. Ransom, 224. N.Y.233. Of the debtor and creditor group the most common example is probably the mortgage cases. Where one who purchases mortgaged property, expressly assumes payment of the mortgage, this may be enforced by the mortgagee provided the vendor of the property was himself personally liable to pay the mortgage. Burr v. Beers, 24 N.Y.178.

After Lawrence v. Fox the court shows hesitancy in extending the doctrine. Then with extreme conservatism with regard to manifest justice on the one hand and a departure from the common law principle of privity on the other, the court proceeded to enlarge the doctrine to include the donee beneficiary contracts.

The donee beneficiary contracts which have arisen from the Lawrence v. Fox doctrine may be divided into two classifications - the public contract cases and the gift cases. Before Seavor v. Ransom (supra) by an anology to the debtor and creditor cases, it had been held that to permit the beneficiary to sue, it was necessary that a relationship exist between promisee and beneficiary. The public contract cases will be discussed first.

These contracts include a large class entered into by city, state and Federal authorities to benefit particular groups of citizens. The general principle is that where a contract is made by a governmental agency and a promisor upon a valuable consideration to benefit a third person, such third person may enforce the contract although not named therein. But to entitle such third person to recover it is necessary that the contract be entered into for his direct benefit.

The first cases to apply this doctrine adhered to the old privity idea and held that for a resident of a city to take advantage of a contract made by the municipality with its contractor, it should appear that there was an intent on the part of the municipality to secure some direct benefit to its residents and further, that there was some obligation or duty owing from the municipality to the resident

which gives the latter a legal or equitable claim to the benefit of the contract, and which places him in privity with the municipality enabling him to bring his action against the contractor.

In a contract between the city and a railroad company the latter agreed to pay damages resulting to any person or property from the work to be done, including damages resulting from change of grade of the street. The intent of the municipality was clear. The words can be read in no light but to show an intent that the railroad should pay change of grade damages and these could relate only to those whose property abutted the work. This would have been sufficient to uphold the right of the third person to sue, but because of the assumed necessity of reiterating the dictum of previous cases, the courts usually went on and enlarged on the privity requirement. This superfluity was usually expressed by stating that the obligation or duty essential to exist between the municipality and the land owner arises from the fact that the municipality is under some obligation to protect its inhabitants. When it enters into a contract for public work, which may result in damages to one of such inhabitants, the municipality may require the contractor to compensate the person injured. Rigney v. N.Y.C.& H.R.Co., 217 N.Y.31; Schnaier v. Bradley Cont.Co.,181 A.D.538.

Similarly where a water, light, or railroad company in consideration of the right to lay and maintain its water, electric, or railroad lines through a city's streets, agrees to furnish the public service undertaken at a rate not to exceed a certain specified sum, an individual resident may have an injunction restraining the company from enforcing collection of a rate in excess of that fixed by the contract. Pond v. New Rochelle W.Co., 183 N.Y.330.

Where, however, such public contract is merely to save the public body harmless, no action upon the contract may be maintained by third persons who otherwise would have no cause of action. Buffalo Cement Co. v. McNaughton, 90 Hun 74. See also Moch v. Rensselaer Water Co., supra.

There was some consistency in holding that public contracts came within the doctrine as it finally evolved before Seavor v. Ransom, supra, that is, the necessity of a relationship. It is difficult to picture many situations where the requirements of the rule are not met, for in nearly all cases it may be said that the relationship creating a moral obligation between a government and its citizens is always present. The difficulty arising in these cases is to determine whether or not the contract is intended to directly benefit the third person to the extent of giving him enforceable rights thereunder - really more a case of interpretation of contracts than the establishment of privity or relationship.

The rule as to private donee beneficiary contracts was more difficult to define and apply. To grasp the significance of the troublesome problems which arose out of Lawrence v. Fox as applied to these contracts, the decision requires careful examination. Although the case involved a debtor and creditor relationship between the promisee and the beneficiary, it is important to note there is nothing in the case which indicates the court considered such relationship or privity absolutely necessary. In fact the court quotes with approbation a Massachusetts case, decided before the courts of that State had overruled the rights of third parties and had reverted to the strictly technical and legal rule. This case, it seems to us, states clearly and concisely what the court deemed to be the controlling

principle in Lawrence v. Fox in sustaining the right of Lawrence to maintain his action and win the case. The Massachusetts case was Brewer v. Dyer, 7 Cush.337, 340 and the part quoted: ". . . recovery was upheld . . . on the principle long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."(id. p.272).

This is merely an indirect way of saying that privity is not necessary to enable the beneficiary to recover. By saying "that the law operating upon the acts of the parties establishes a privity," the court really meant that the law dispenses with privity in the strict sense. This interpretation is stated in Seavor v. Ransom, 224 N.Y. 233, as follows: "The court in that leading case,(Lawrence v. Fox) attempted to adopt the general doctrine that any person, for whose benefit a contract was intended, could sue on it. The headnote thus states the rule." (p.240).

Thus Lawrence v. Fox established a clear, concise and simple principle which would have served adequately to uphold the rights of donee beneficiaries. It was neither essential nor even desirable that the courts should have attempted to circumscribe so wholesome a rule with the requirement that there should exist between the promisor and the donee beneficiary a duty or relationship. It has been this latter requirement that has caused all the uncertainty and confusion by trying to draw an analogy to what we consider a dissimilar situation, the debtor promisee-creditor beneficiary relationship.

Among the first cases to establish the necessity of privity was Vrooman v. Turner, 69 N.Y.280. This case involved an action by a mortgagee against a subsequent grantee who had assumed the payment of a mortgage which his grantor was not personally obligated to pay. The court in denying recovery declared first, that the grantor (promisee) did not intend to secure a benefit to the mortgagee (beneficiary); and second, that the grantor owed no duty to the mortgagee. It is to be noted that the benefit expected to result to the plaintiff was merely incidental to the general object of the contract, the promise having been required, probably, under the mistaken idea that the grantee would thus be protecting the grantor from liability. In any event this would have been sufficient ground for the decision, so that the following excerpt, which has done so much to retard the liberalization of the doctrine, can be considered pure dictum. "A legal obligation or duty of the promisee to him (beneficiary) will so connect him to the contract as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing evidence of the intent of the latter to benefit him, and create a privity by substitution with the promisor. There must be either a new consideration or some prior right or claim against one of the contracting parties." (id. p.284).

A suggestion, which the courts might have followed to advantage, has been underlined above, i.e., that the relationship is valuable as evidence in determining the intent of the parties. Instead they

chose to predicate substantive rights thereon.

The necessity for privity was further developed in Dunning v. Leavitt, 85 N.Y. 30, 35 where the court held that a party suing on a Lawrence v. Fox promise was asserting a "derivative right", one derived from the relationship of promisee to beneficiary. The third person may be suing on a derivative right but such right comes, not from the relationship of these parties, but from the original contract itself. And this case held a beneficiary is subject to equities between the original parties springing out of the contract between them. If the main contract falls because of some inherent defect, his rights fall with it.

This derivative idea came from the right of a creditor beneficiary to sue the debtor (promisee). Then by various fictions of trust, agency, or subrogation, the courts attempted to transfer the cause of action against the promisee, to one against the promisor, because of the latter's promise to pay the debtor. The hiatus in this argument came when it was applied to the relationship by blood or marriage cases. In these, the New York courts, beginning with Knowles v. Erwin, 43 Hun 150, aff'd 124 N.Y.633, began to draw the unsustainable parallelism to the debtor-creditor situation. This case involved the gift of a farm and personal property from a father to a son in return for the son's promise to pay the donor's daughter a stipulated sum annually. The action was brought by the daughter against the son. The court, in upholding the right of the daughter to sue, stated that, although the relationship of debtor and creditor did not exist, that of parent and child did and that was sufficient consideration to support the promise.

A derivative right based upon a moral obligation is no more efficacious to support an action against the promisor than it was against the original obligor. Love and affection never have been held sufficient consideration to support a contract, and a contract right predicated thereon can obtain no greater validity.

The court also stated in this case that a child was a proper object for the bounty of a parent. It seems as though the court was attempting to measure contract rights upon the propriety of one person bestowing a gift upon another, rather than upon the legal principles of intent and delivery of an executed gift. A moral obligation cannot establish consideration for an incomplete gift. Why the court should persist in using the word consideration (with all its legal import in contract law) interchangeably with moral obligation is difficult to understand except that the court, realizing the patent justice in permitting the plaintiff to recover, rationalized to justify the decision.

The court goes on to say: "The consideration being such as is recognized by the court, the case presents the simple question of a promise from one person to another to pay a debt to a third person. The right of the third person to recover of the promisor for such debt is unquestioned." The court absolutely disregards the fact that there was no debt in the legal sense of the word. It seems to say: "There was a duty, so we will create a debt, and give it legal efficacy." This is either sheer fiction or a confusion by the court of the consideration supporting the main contract (a valuable quid pro quo) with the relationship between the promisee and the beneficiary.

The case of Gates v. Hames, 8 N.Y.Supp.287, is another example of the problems involved in applying privity to third party contracts. The relationship was that of grandmother. The court, denying recovery, relied solely on what we consider the dictum of Vrooman v. Turner,

supra. The court goes on to say that the benefit, which the promisee attempted to provide, was a mere gratuity, the motive being love and affection. Such is sufficieht consideration for an executed contract, but not for a mere promise or executory agreement. But if such be considered a gift, it certainly must be considered a completed one. The exchange of promises forms a valid and binding contract which is sufficient to meet the requirements of intent and delivery of a complete gift of a chose in action. It creates an advantage which is immediate and, so far as the donor is concerned, fully executed beyond his control. The courts have held the promise so far executed in the case of a donee beneficiary that his rights cannot be destroyed even by mutual rescission. Knowles v. Irwin, supra. If that be so, the court, in the Gates case, supra, was clearly in error in considering the contract an executory agreement to make a gift. An executory agreement to make a gift can always be rescinded.

The injustice of refusing to a donee beneficiary the right to sue was manifested in Coleman v. Hiler, 85 Hun 547. A desired to make a gift to a close friend who had rendered him services. A transferred all his property to his wife in return for her promise to pay the friend. She died without fulfilling her promise and the friend sued her estate. The court refused recovery stating as its reason the lack of privity between the promisee and the beneficiary citing as authority the dictum of previous cases.

In Babcock v.Chase, 92 Hun 264, the relation of grandparent was held sufficient, thus overruling the holding of Gates v. Hames, supra. In Klotz v. Klotz, 20 Misc.662, a woman to whom the promisee was married was denied recovery. Yet, in DeCicco v. Schweizer, 221 N.Y.431, a fiancee was allowed recovery.

The foregoing is sufficient to indicate the confusion and the tenuous reasoning of the courts in applying the relationship hypothesis.

The case which has done most to accelerate the complete obliteration of the hitherto indispensable privity was Seavor v. Ransom, 224 N.Y.233. Here A promised his wife, in consideration of her leaving a house to him in her will, to provide for her niece in his will. A died without performing and the niece brought an action against his estate. The court in allowing a recovery, said: "The tendency of American authority is to sustain the gift in all such cases and to permit the donee-beneficiary to recover on the contract. The equitie are with the plaintiff and they may be enforced in this action, whether they be regarded as an action for damages or an action for specific performance. . ." Also quoted with approval was Judge Kellogg "The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit the effect of that case."

Judge Pound classified the cases in which the right of a third person to recover had been sustained, under four groups. After stating the usual types, he concluded with, "When at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration", citing Rector etc. v. Teed, 120 N.Y.583. Strangely ehough this case had been given little consideration by the courts, as it was believed that it did not come strictly within the Lawrence v. Fox doctrine. Yet upon this case some of the more recent decisions rely as furnishing the affinity for bringing the beneficiary, not in privity with the promisee, but in privity with the promisor. In the Rector case, in consideration of

one Wright withdrawing a contest to a will (in which neither the plaintiff nor the defendant had any interest) the defendant promised to pay the plaintiff $500. He gave Wright a note containing the promise. Wright in turn delivered it to the plaintiff. The action is on the note. The court held the promise was made directly to the plaintiff and there was a clear intention on the part of the promisee, who furnished the consideration, to secure the benefit to the plaintiff. "The intent of the parties should not be defeated by releasing the defendant from his promise after he had received the consideration therefor, simply on account of the form of the transaction, which violates no statute, nor any rule of public policy." And further, "Even if the promise had been made to Wright, for the benefit of plaintiff, an action would lie upon the promise if found upon a good consideration between the parties to the promise."

We believe that this case fell squarely within the broad rule of Lawrence v. Fox. The promisor made the promise directly to the promisee, giving to him as evidence of the promise, the note, to be delivered to the beneficiary. Except for the conveyance of evidence of the obligation assumed by a promisor to the third person, as a proposition of law, this is what happens in all third party contract situations. A promise is made to the promisee for the benefit of a third person; it matters not how the latter is informed, nor how he proves the contract. It can be truly said that whenever a third party is entitled to sue, the promise runs to the beneficiary.

Thus, in Maltby & Sons Co. v. Wade, 131 Misc.143, a public construction contract required a provision that any material man or laborer could recover upon the bond as though named therein, which bond was furnished by the defendant. Plaintiff furnished material and sues on the bond. He recovers as though the promise had been made directly to him.

In Barsuk v. Independence Indemnity Co., 142 Misc.260, the defendant agreed to insure the owner and/or any person legally operating the auto with the permission of the owner, against loss arising out of the liability resulting from injury or damage caused by the use of the auto. Plaintiff, who was not the owner, became involved in a collision while operating the auto, and sues defendant on the contract for expenses incurred by him for attorney's fees, costs, and recoveries. The court sustained the action, holding that the promise in the policy ran to the plaintiff.

Graybar Electric Co. v.Seabord Surety Co., 157 Misc. 275, involve a private construction contract. The defendant furnished a bond providing "that this undertaking shall be for the benefit of any material man or laborer having a just claim, as well as the obligee herein (Sears Roebuck Co.)" The defense to an action by a materialman was that the plaintiff has no right to enforce the bond because there was no privity of contract between the defendant and the plaintiff, and that the promisee owed no duty nor obligation to the plaintiff. The court held that the promise ran to the beneficiary. Here the beneficiary was named in the bond, not specifically it is true, but as a member of a limited class. The bond was delivered to the promisee for the benefit of all indemnified. . . . . The object sought was to indemnify persons who later aided in doing the work. As was said in Strong v. Am.Fence Constr.Co., 245 N.Y.48, 55, 'Security to materialmen and laborers was the end and aim of the transaction. If the promise was not for them it was without significance.'"

The court in the Graybar case, commenting on Seavor v. Ransom, supra, pointed out that the Seavor case "did not merely indicate an

abstract classification of cases in which a beneficiary might enforce a promise. The concrete issue before the court was determined on the broad principle that where the intention of the parties was clearly to grant to a third party beneficiary the right to enforce a contract, that right should not be denied unless the facts in the case made it inequitable to permit such action."

Such has been the logical growth of the principles established in the dictum of the Seavor case. We say dictum for it is to be remembered that the case involved a relationship (niece). The subsequent history of that case was the reverse of that of Lawrence v. Fox. Instead of restricting the application of these principles to the facts of the Seavor case, the courts have extended them. The requirement of some obligation or duty running from the promisee to the third party has been progressively relaxed until a mere shadow of the relationship suffices, if indeed it has not reached the vanishing point. Today a beneficiary of a promise, clearly designated as such, is seldom left without a remedy." McClare v. Mass.Bond &Ins.Co., 266 N.Y.371. Wilson v Costich Co.,251 A.D.546, Aff'd 256 N.Y.629 without opinion, went even further and declared that in a "public contract case a broad principle of public policy should operate in the plaintiff's behalf, in spite of the absence of privity."

Thus under N.R.A. agreements between the United States and employers employees have been permitted to sue and receive the benefits Mesloh v. Schulte, 151 Misc.716; Canton v. Palms, Inc.,152 Misc.347.

The Grabar and the Wilson cases, together with those cases which hold that the promise runs to the beneficiary plainly indicate that th time-worn allusion to the citadel of privity, as applied to this situation, has been completely undermined and abolished. We believe a dut or obligation owing from the promisee to the beneficiary is no longer required in New York State. Thus we return to the broad and salutory rule of Lawrence v. Fox that any person, for whose benefit a contract is intended, can sue on it.

"The doctrine permitting a recovery by the beneficiary has prevailed in the United States on the strength of its reasonableness and necessity, rather than upon any preconceived general theory of law. In the early stages of the development of the doctrine, the courts adopting the same felt themselves called upon to justify it in the light of established principles, supposing it to be an anomalous rule. But now that the doctrine is firmly established and its respectability is unquestionable, there is no occasion for giving it a fictitious basis or origin, or laying it, cuckoo fashion, in the nests of agency, subrogation, trusts, etc. Nor is there now any necessity for the make believe 'privity' between the third person and the parties to the contract. The doctrine has become a rule of law in its own right, and should be so treated." Carson Pirie Scott & Co. v. Parrett, 81 A.L.R. 1284, 1285 n.

Today, there is less necessity to deal with legal fictions. Realties in fact and law should be the province of the courts. We have dispensed with much of the formalism and the unwieldiness of the common law and, yet, have been unable to retain its fundamental virtues. To enforce the contract as the parties made it, by permitting the real party in interest to sue, eliminates the equivocation and uncertainty with which third party contracts have been fraught. It will do justic to the person intended to be benefited and will not legally harm the promisor.

CLARENCE HENRY GIRARD

UNFAIR LABOR PRACTICES

The passage of the National Labor Relations Act in 1935 opened a new field of administrative law to the lawyer. It gave rise at the same time, to a chorus of lamentation amongst the conservative majority of the employers that continued in crescendo until the Act was upheld on all points upon which it was challenged in five cases which came before the Supreme Court on April 12, 1937.

This article will not be concerned with the constitutionality of the Act. Nor will it deal with the scope of jurisdiction of the National Labor Relations Board.

On the latter point, however, it is significant that the Board is being upheld by the Federal Courts in its ever-broadening interpretation of the Interstate Commerce clause which limits the Board's jurisdiction.

On March 14, the Circuit Court of Appeals handed down a decision in the Consolidated Edison case (4 N.R.L.B.10) which affirmed the decision of the Board. The company had contested the jurisdiction of the Board. The Board and the Court ruled that the defendant utility having numerous consumers engaged in interstate commerce, was, itself engaged in interstate commerce by virtue of the fact that it supplied them with electricity used in their interstate operations.

The crux of the controversy between labor and management under the Act has been §8, and with the interpretations of that Section this article will deal.

Section 8 (1) declares it to be an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by §7." The rights established under §7 are stated as concisely as possible by the Section itself: "Employees shall hav the right to self-organization, . . . and to bargain collectively . .

The bulk of the complaints brought before the Board have arisen out of violations of §8, and it is probable that unfair labor practices will, for some time to come, constitute a most disturbing element in the furiously boiling cauldron of Labor relations. An analysis of cases filed with the Board, however, shows a tapering off, and a decreasing percentage of charges of unfair labor practices. This would suggest that there is taking place a gradual adaptation of industry to the principles of the Act. It is at least a favorable indication that the Act is succeeding in its purpose to abolish industrial tyranny, and introduce in its place those same principles of democracy and equality that Americans hold so dear in their political organization.

Of all the cases decided under §8 (1) the Remington Rand decisic (2 N.L.R.B.626) is probably the most worthy of study, for the simple reason that the violations shown there cover the whole range of unfair labor practices with appalling completeness. The practices condemned in that case have been repeatedly denounced by the Board, both before and since the date of the decision.

The Remington Rand labor policy has since become known by the picturesque title of "The Mohawk Valley Formula." The acts which ensued from this policy were in summary as follows:

A joint protective committee representing production and maintenance employees had been organized. This committee was found by the Board to represent a clear majority of the workers in the plants involved. The company refused to negotiate in good faith with the committee and a strike followed. From then on, the company persisted in its refusal to negotiate with the representatives and set out to break the strike. Thirty union leaders were discharged; company-dominated organizations were set up under the guise of "back-to-work" movements; notorious strike-breaking agencies were called in. A publicity campaign was waged to induce the public to believe that the strikers were in the minority. Hundreds of so-called "missionaries" were hired by the company and sent out to circulate among the strikers, and visit their homes to spread false rumors and demoralize the striking men. One of the company's hirelings, known to the strike-breaking fraternity as "Crying Nat Shaw", unsuccessfully attempted to bribe the president of the State Federation of Labor. The company hired "guards", whom the Board found were not needed for guards, and whose job was to provoke the strikers and deliberately instigate violence.

In view of these facts the Board held that it is a violation of §8 (1) for the management:

1. To spy on union activities personally or by agents.
2. To use any activities designed to end the strike by breaking it, in contrast to settling it by collective bargaining.
3. To spread propaganda against unions.

Each subdivision of §8 will now be dealt with separately in closer analysis of the unfair labor practices described therein. It should be noted that a violation of any of the other subdivisions of §8 is, in fact, a violation of Subd.1.

A. Interference, Restraint, Coercion.- Getting closer to the line between fair and unfair labor practice, the Board held, in Re Pennsylvania Greyhound Lines, 1 N.R.L.B.1, that employer "advice" against self-organization is an interference with the rights guaranteed by §7. Evidence of the employer's unfair conduct prior to the Act was admitted to appraise his later conduct.

Coercion of employees by expressing hostility to the union, discouraging membership, and intimidating members, and locking out men who attended a union meeting, is a violation of §8 (1). In Re Santa Cruz Fruit Packing Co., 1 N.L.R.B. 454.

In Re Hardwick Stove Co., 2 N.R.L.B. the employer claimed tha it had modified its previous strong anti-union policy to meet the requirements of the Act. There was no evidence that it publicly announced that it would no longer interfere with a union. The court held that the employer's failure to communicate its change of policy to workers left them in the belief that it would continue its measures against unionism. Under these circumstances the failure to inform employees of the sudden change of heart was equally as effective to prevent their exercising their rights under the Act as open intimi dation and discrimination.

B. Discrimination.- A very frequent form of violation is the us of the power of hiring and firing to discourage organization and collective bargaining. This takes the form of discrimination against union men, or those thought susceptible to unionism, by discharging them, demoting them, laying them off, or putting them on jobs which isolate them from the other men. All these acts have been held viola tions under §8 (1) or (3).

In deciding whether there has been discrimination in a particular case, the Board considers all the surrounding circumstances. It looks into the actual motivation of the employer, as manifested by his actions, past and present. Like equity, it looks at the real substance, and not the form. In the Matter of Houston Cartage Co., 2 N.L.R.B. 1,000 the evidence disclosed that the respondent had been hostile to the union from its inception. One Brooks, a truck driver, joined the union and was elected president. Three days later Brooks' truck was followed by the treasurer of the company. He was trailed for several days and then discharged allegedly for infraction of the company's rules in exceeding the speed limit, and deviating from his route. In view of the facts, the Board did not find persuasive the company's argument that it had discharged him for cause. The Board will look through the subterfuge intended to conceal the real motivation.

In Matter of Agwilines, Inc., 2 N.L.R.B. 1,/ the respondent discharged the president of the union the day following his election. The company said he was inefficient. It produced no evidence of inefficiency. The Board was unconvinced. The employee was ordered reinstated

The decision was for the employer in the North Whittier Heights Citrus Ass'n case, Case No. C-310. The company produced evidence that an active union member, who had been discharged, had had a dispute wit: a supervisor and had complained about not being able to do heavy work. The Board held that the discharge was not discriminatory.

In the Harrisburg Dress Co. case 2 N.L.R.B.1058, the Board held that a subtle threat of discharge for joining the union was readily understood by the workers as such, and was a violation. The employer had made several speeches informing his men that they had no cause for alarm concerning coercion by the union, because the company would protect non-union men.

The Board has found intimidation and coercion in the practice of calling in employees one by one and asking them bluntly whether they are union men or not. Re Greensboro Lumber Co., 1 N.L.R.B. 629.

In cases where there has been an unduly high percentage of union men or leaders in a series of discharges the Board has found this persuasive evidence of discrimination. Re Protective Match Service Co., 1 N.L.R.B.639.

Going beyond this the Board has held that it is not necessary that the discharged employee be a union member to constitute violation. The true test of discrimination is whether the discharge has a necessary effect of discouraging membership in the union. The Quidnick Dye Works discovered this point, when they discharged a non-union man whose brother had been an active union member, and who had been discharged the preceding day. Both were ordered reinstated.

In many cases the Board dismissed the complaint when the evidence failed to support the allegation of discriminatory discharge. One case involved the hiring of longshoremen who are picked at random for a day's work from a crowd. There was no certainty that anyone would get work. The only evidence of discrimination was failure to receive work on a single day. This was insufficient.

Likewise in the Union Pacific Stage case, 2 N.L.R.B.489, where an active union man was discharged, and where it was shown that he had smoked on duty, and tampered with the governor of the bus he drove, the Board decided that the allegation of discriminatory discharge was not

sustained.

Discriminatory refusal to reinstate union men after a shut-down, lock-out, or strike is a violation of §8 (1) (3). Where the original severance of employment was itself an unfair labor practice, the Board held in the Remington Rand case and others that the employer is bound to offer to reinstate the men, whether or not they apply for a job.

These discrimination cases clearly indicate that §8 (3), as interpreted by the Board, is not intended to interfere generally with age-old power of the employer to hire and fire as he pleases. An employer may, without violating the Act in any way, fire anyone he chooses for any reason except one, or for no reason at all. The single restriction on his freedom of action in this regard is this: he must not use the power to encourage or to discourage membership in any labor organization.

C. Refusal to Collectively Bargain.- Subdivision 5 declares that refusal to bargain collectively with the representatives of the employees is an unfair labor practice.

The primary requirement of collective bargaining is meeting with the representatives of the employees. Refusal to meet with them is a violation of the Act. There must be an attempt by the employer in good faith to settle disputes in meetings with the labor representatives. It is not required that the employer accede to the union's terms. It is not required that any contract be made. But the provision does expect an actual bargaining process, in which an attempt is made in good faith to reach common ground upon which a contract can be made.

In the Trenton Garment Company case there was evidence that the employer attempted honestly to reach an agreement with the union, but failed to do so because it was unwilling to sign a closed shop agreement. The Board found that the Company had not violated the Act.

In Re Fansteel Metallurgical Corporation, decided March 14th, the company had refused to negotiate with a union representing a majority of the employees of the appropriate unit during a strike caused by the employer's unfair labor practices. The workers conducted an illegal sit-down strike. The Board decided that the illegality of the sit-down strike did not end the employer's duty under the Act to collectively bargain with the strikers.

In a previous case (Matter of Columbian Enameling & Stamping Co 1 N.L.R.B.181), the Board had stated that "Employees do not cease to be such because they have struck." It is on this theory that the employer is still obliged to bargain collectively after a strike has been called. There are reasons of public policy for this holding. powerful weapon for industrial peace should not be rendered ineffective upon the outbreak of industrial warfare. Collective bargaining may be a means to an end of the strike.

Attempts by the employer to avoid collective bargaining with unions by bargaining individually with its employees are violations. In Matter of Atlas Bag & Burlap Co., 1 N.L.R.B. 292, the employer obtained individual contracts of employment with its workers instead of bargaining with the designated representatives of the majority of the workers. This was held an unlawful labor practice.

Several important cases have come out within the past year re-

lating more directly to the administrative remedies under the Act, and yet indirectly to the collective bargaining provision, since they make effective enforcement of the provision possible. In one of these, the S. & K. Knee Pants case, 2 N.L.R.B. 940, the company had closed its plant and moved to a new location in order to avoid recognition of, and collective bargaining with, the union. The order issued by the Board, in addition to the requirement that the company reinstate all former employees, ordered that it reimburse each of said employees for his transportation expense and that of his family incurred in moving to the new location.

D. Company Unions.- Subdivision 2 prohibits the employer from dominating or interfering with the formation or administration of any labor organization.

This provision was effectively designed to stamp out company unions. The Board in interpreting it has held that every act which tends to destroy the free choice by employees of a labor organization to represent them is an unfair labor practice. Such acts may have the immediate purpose of breaking a strike, or weakening the power of an existing union, or of building up a wall of protection against a genuine union.

Thus in the Fansteel Metallurgical case, decided March 14, 1938, it was held that there was a violation of the provision. The company had exhibited "Well publicized animosity toward an outside union" and "open affection" for an inside union. It had provided the inside union with a meeting place and use of company bulletin boards.

In the Ingram Mfg. Co. case, the company violated the Act by supporting an employee council in a membership drive and by discrediting an outside union. Supervisory employees of the company had done the work of discrediting the outside union despite management instructions to the contrary. The Board held that the employer is estopped to disclaim the activities of its supervisory employees since it made no move to convey its disapproval of their acts to the workers.

Coercing employees to join a certain union, creating or sponsoring a union, and lending financial support are practices that have been repeatedly condemned by the Board.

E. Conclusion.- In evaluating the importance of the decisions of the National Labor Relations Board, it should be born in mind that this system of labor law is apparently to become a permanent aspect of our economic life. Similar acts have been passed in a number of states including New York. The New York Act is substantially the same as the Federated Act in form and almost exactly the same in content. The New York Act having gone into effect this past July these Federal decisions will become the law governing the industrial relations of all the industry within this State as well as interstate commerce.

HAROLD GORDON TURNER.

LABOR UNION - UNITY OF INTEREST - RIGHT TO PICKET

There is no field of the law today which presents a greater challenge to constructive thinking than that embracing the relations of organized labor to organized capital. How far a capitalist society can go in meeting the demands of a militant labor movement presents social, economic, and legal problems of the first magnitude. Labor is on the march; it demands a larger share of industry's income and is determined to get it. It is foolish to fight unionism as a principle; labor organizations are a part of modern industrial life, and the sooner we recognize that fact and direct our efforts to working out a sound labor policy, instead of resisting them blindly, the better it will be for the cause of economic democracy.

Although the American labor problem is involved in a deplorable confusion of both mind and purpose, we have, nevertheless, adopted a liberal outlook to the extent of evincing a willingness to admit the justice of labor's cause. But it was not always so. To assure oneself of this, one has but to read some of the old cases in which a striking labor union has run afoul of the courts. No doubt many of the injunctions which have been issued in labor disputes have been amply justified by the tactics of the strikers in seriously injuring substantial rights of the employers. But no fair-minded person can read the older labor dispute cases without being impressed with the sheer capriciousness and arbitrariness with which many injunctions have been issued. The reason of course, is to be found in the high regard which the law has for private property rights. The sacredness of private property is a fundamental concept in the law, and courts have been loath to make any inroads upon it. But while courts may have been legally correct in issuing injunctions to protect the supposed property rights of the employer, nevertheless in doing so, in many instances, they have exhibited a singularly benighted economic and social attitude in regard to the realities of modern industrial life.

Fortunately, there is now a plainly discernible trend in the other direction. Courts are showing signs of an awakened social consciousness, which has already gone far to accord to labor the legal rights it has so long been demanding. There is no longer any question as to the abstract right of labor to organize for the purpose of collective bargaining, to strick to enforce its demands on the employer, to picket peaceably and to boycott non-union goods. But other legal problems of equally grave social importance have arisen to take their place. They revolve around such controversial questions as what union shall do the collective bargaining; what are unfair labor tactics; how shall we deal with a sit-down strike, and the whole issue of craft versus industrial unionism. These and other kindred matters have become so much a matter of national concern that we now have a Federal law which attempts to define some of the rights of organized labor and to limit the activities of the anti-union employer. The wisdom of the law is open to serious question, but at any rate we have recognized that the laborer as well as the employer has rights which need the protection of the law. This sudden concern for the rights of labor which dates from the days of N.R.A. is, of course, due in large measure to labor's increased political influence The possible danger in our haste to meet labor's demands, is not that we have not gone far enough, but that we may have gone too far, at the expense of the employer whom the law once strove so hard to protect. That the Wagner Labor Act is a one-sided affair, rigged almost

exclusively in favor of the unions, no one but the most partisan union sympathizer can deny. The 1937 wave of sit-down strikes accompanied with mass violence and a defiance of the law with which authority was powerless to cope is dramatic evidence of the length to which we have gone in tolerating the tactics of organized labor when on strike.

A notable example of the court's increased sympathy for the cause of labor is to be found in a recent decision of the Court Of Appeals in the case of Goldfinger v. Feintuch, 276 N.Y.281. The decision in effect held a secondary picket against a non-union product to be legal provided the retailer who sold it was in unity of interest with the manufacturer. The possible significance of this decision to labor depends in large measure on how far the courts will go in interpreting the phrase "unity of interest." If limited to the facts of this particular case, the decision has comparatively little significance. If, however, the phrase be interpreted broadly so as to give to a union the right to picket and boycott any retailer through whom a manufacturer disposes of his product to the public, then the Court of Appeals has placed in the hands of the union an instrument of power by which the union could seriously injure the business of any retailer selling the non-union product of a manufacturer.

The facts out of which this case arose are somewhat unique in that the retailer whose store was being picketed employed no help himself. The union's grievance against him was not that he was unfair to his help nor that he employed non-union labor, but that he sold at retail products which were manufactured by non-union labor. M. & I. Blumenthal was the manufacturer of kosher meat products sold under the name of "Ukor" which were the only non-union-made kosher provisions sold in New York City. The defendant, Butcher Union Local No. 174, to further its efforts to obtain a union agreement with the manufacturer, decided to picket the non-union meat products at the manufacturer's retail outlets. One of the stores picketed by the defendant was that of the plaintiff, a dealer in Ukor products. The pickets carried placards which bore the inscriptions in both English and Yiddish, "This store sells delicatessen that is made in a non-union factory," and "Ukor Provision Company is unfair to Union Labor. Please buy union-made delicatessen only." Upon disputed facts the Special Term found that the picketing carried on by the defendant union was peaceable and refused an injunction at the suit of the plaintiff. The Appellate Division disregarded the findings of the Trial Judge and chose to believe the evidence of the plaintiff that the defendant had threatened to ruin his business unless he refrained from selling Ukor products, and so reversed the Special Term and issued an injunction.

Upon appeal to the Court of Appeals, the majority of the court sustained the findings of fact of the Appellate Division, but then went on to hold that the picketing of the plaintiff's store by the defendant union, provided it was done in a peaceable manner, was not in itself illegal. As to what constituted peaceable picketing, Judge Finch, writing the majority opinion had this to say: "Picketing is not peaceful where a large crowd gathers in mass formation or there is shouting or the use of loud speakers in front of a picketed place of business, or the sidewalk or entrance is obstructed by parading around in a circle or lying on the sidewalk. Such actions are illegal, and are merely a form of intimidation. Likewise it is illegal to picket the place of business of one who is not himself a party to

an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of coercing the owner to take sides in a controversy in which he has no interest. Nor is it legal to threaten to ruin the custom and trade generally or to accost or interfere with customers at the entrance to the store. Disorderly conduct, force, violence or intimidation by pickets should be sternly suppressed by the police and administrative authorities."

The court then goes on to discuss the legality of picketing retail establishments which handle non-union products. "Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer, but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public.

"We do not hold more than that where a retailer is in unity of interest with the manufacturer, the union may follow the non-union goods and seek to persuade the consuming public to refrain from purchasing the non-union product, whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of interest with the manufacturer. Such storekeeper may be, as in the case at bar, the sole person required to man his business. . . . In other words, it (the union) may, in a proper manner and in a peaceful way, ask the public to refrain from purchasing products made by non-union labor and state where the same are sold."

Judge Lehman, concurring in part, held "that the peaceful picketing of the plaintiff's place of business by the defendant union for the purpose of inducing the plaintiff's customers from buying non-union products of a manufacturer, which are on sale by the plaintiff, is lawful" and that such activities do not constitute a secondary boycott.

Judge Rippey also concurred "in the result reached solely upon the ground that the trial court found upon sufficient evidence that there was complete unity of interest between the plaintiff and the manufacturer." But he hastened to add that, "except for the finding of unity of interest, the facts would establish a secondary boycott and would be illegal."

The decision was not, however, without a dissenting voice. Judge Hubbs dissented "upon the ground that even if defendant could generally by publicity, urge people not to purchase the Ukor products, that does not permit the defendant to say to a dealer who does not employ help that they will ruin him and his business and to carry out that threat by picketing his place of business. That is a secondary boycott and I think it is illegal and against public policy."

It is my opinion that the majority opinion of the court states the better rule of law and the one which is more in accord with a

sound and enlightened public policy. But it would seem that the court has enunciated a doctrine by which a labor union on strike could drag into the dispute retailers whose only connection with the controversy is that they dispose of the manufacturer's product to the public. The two things necessary to make a secondary boycott legal are that there exist unity of interest between the retailer and manufacturer and that they be in the same line of business for profit That there was the necessary unity of interest between the retail delicatessen dealer and the processor in this case to make the boycott legal was conceded by all the majority members of the court. The facts of the case, I think, amply justify the decision.

Prior to the decision in the case under review secondary boycotts were generally held to be illegal as against public policy. The interesting question for speculation, therefore, is, how far has this case gone in changing a heretofore well settled rule of public policy. Not so far as would at first appear, I think. The case cannot, I feel sure, be taken as authority for the proposition that secondary boycotts generally are now legal. So far as I am aware, there have been no decisions further interpreting the phrase "unity of interest" since this case was decided on December 7th of last year. There are, however, two cases in the Miscellaneous Reports which, although decided prior to Goldfinger v. Feintuch, supra, may, nevertheless, throw some light on the possible future interpretation of the phrase. The first one is the case of Commercial H. & W. Cleaning Co. v. Awerkin, 138 Misc.512, in which the court held that the plaintiff who was engaged in the business of cleaning windows in various buildings in New York City was entitled to an injunction restraining the defendant Window Cleaners Union from inducing the plaintiff's customers to break their contracts with it, and from picketing and carrying placards in the vicinity of the places of business served by the plaintiff in its window cleaning business. The court held that the activities of the defendant union constituted an illegal secondary boycott.

The other case is that of Englemeyer v. Simon, 148 Misc.621, which involved a strike of a bakers' union against an operator of a bakery. The court held that "the picketing of the places of business of some of plaintiff's customers, bearing placards, which advertised the union label and requested sympathizers to purchase bread only with the union label, does not amount to a secondary boycott, and, where no threat, coercion, intimidation, or fraud is shown, is not illegal."

The difference between these two situations is readily apparent. In the window cleaners case, the parties were not at all in the line of business, the plaintiff being engaged in the business of cleaning windows, while his customers were theatres, stores and office buildings. It would be hard to find any unity of interest between the plaintiff and his customers which would justify the defendant union in picketing office buildings with which the plaintiff had contracts to clean windows. In the words of the court in the Goldfinger case "It is illegal to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of coercing the owner to take sides in a controversy in which he has no interest." The fact that the suit was brought by the party against whom the union was striking rather than by the party against whom the union was conducting its picket, as in the Goldfinger case, is, I think, quite immaterial.

In the baker's case, in which the court held the picketing of

plaintiff's customers to be legal, the parties, if not in the same line of business, were at least in similar lines of business. At any rate it is a little easier to see a unity of interest between a baker of bread and the retail grocers who sell his bread, than between the window cleaner and his customers. The case is more nearly akin to the Goldfinger case, with one important exception; and that one exception may be the thing which will limit the application of the unity of interest rule within rather narrow bounds.

So far as it appears from the report of the Goldfinger case, the delicatessen dealer handled no other kosher provisions except Ukor. A retail grocer handles many other foodstuffs besides bread. The unity of interest between a manufacturer and a retailer who sells that manufacturer's product exclusively is much more real than the possible unity of interest between a manufacturer and a retailer, who like the average grocer, sells a multitude of things besides the product of that particular manufacturer. The question, therefore, presents itself, whether the unity of interest rule will legalize secondary boycotts only in those cases where the retailer sells the manufacturer's non-union product to the exclusion of all others. In other words, is the unity of interest between a manufacturer and a retailer of many items, other than that of the manufacturer in question, sufficiently close to justify legally a picket of the retailer's place of business when the manufacturer's employees go on strike?

There is one thing to note about the bakery case which may supply a possible answer to this question. The picket was against the non-union bread and not against the retailer's business generally. The placards which the pickets carried advertised the union label and requested sympathizers to purchase bread only with the union label. The placards made no suggestion that the retail grocer himself was unfair to union labor; as in the Goldfinger case the placards carried by the pickets referred only to the non-union product. From this circumstance may it not reasonably be inferred that to be legal the picketing must be against the product itself and not against the retailer's entire business? If this be a logical deduction, it would presumably be legal for pickets to carry placards saying: "Don't buy Smith's hosiery at Jones' Department Store", but not to carry placards saying: "Jones Department Store is unfair to labor."

The reasonable inferences to be drawn from the language of Goldfinger v. Feintuch, together with the two Miscellaneous cases discussed I believe to be these: First, for a secondary boycott to be legal as against a retailer who offers to the public a non-union-made article it is not necessary that he handle that article to the exclusion of all others. I do not believe that the phrase "unity of interest" will be so narrowly interpreted. Second, the manufacturer and the retailer must be, if not in the same line of business, at least in a substantially similar type of business. Third, there must appear to be a unity of interest between retailer and manufacturer. Fourth, the picketing must be directed against the non-union product itself, and not against the retailer's whole business. Lastly, the picketing must be carried on in a peaceful and orderly manner without threats, intimidation, force, or violence. Within these limits, I believe it to be now established that the union may aid its cause. Just how great a gain this will prove to be for union labor will depend largely on how wisely it exercises its new privelege.

HUGH ROSS ELWYN

INSURANCE

CONTINGENT INCIDENTAL BENEFITS IN CONTRACTS

Contracts made for a general purpose often contain incidental provisions by which under certain contingencies an added benefit may accrue to one of the parties. Since these provisions are added to promote business, they usually are based on contingencies feared by the other party. So long as the benefit in question is not the main reason, or one of the main reasons for the other party's entering the contract it will not make the contract one of insurance. If an agreement is found to be an insurance contract it may be void because the makers have not complied with the requirements of the insurance laws or because insurance is ultra vires of the corporation making the contract. The contents of the agreement may also bring the rights of the parties under the rules of insurance law.

The New York Insurance Law, §9, prohibits unauthorized persons or corporations from engaging in the business of insurance but does not define that business. The courts are therefore left to the common law definition. Recently, in deciding whether a watch company which promised to replace any watch lost by a customer within a year of the date of purchase by burglary or robbery was engaging in the business of insurance, the Appellate Division took into consideration what constituted such a practice. The court stated that, broadly defined, insurance is a contract by which one party for a consideration called the premium, assumes particular risks of the other party and promises to pay a certain or ascertainable sum of money on a specified contingency. It cited with approval the statement in Tyler v. New Amsterdam Fire Ins. Co., 4 Robt. 141, that there are five ingredients necessary in a contract of insurance - (1) the subject matter, (2) the risks insured against, (3) the amount, (4) the duration of the risk and (5) the premium of insurance; a contract of insurance is incomplete without any of these. It was decided in the watch company case that the element of consideration, the premium, was lacking, and that the watch company therefore, was not engaged in the business of insurance. No part of the purchase price was paid for the certificates promising the replacement. Olendorff Watch Co. v. Pink, Supt. of Insurance, 253 A.D.73. The Travelers Insurance Company was a party to this action because it had agreed to indemnify the Watch Company for losses under the certificates. There was no question but that the Travelers Insurance Company was acting under its charter because although it was paying under the same certificates the consideration it received was entirely for the indemnity contracted for.

At times it is difficult to ascertain whether the buyer pays his money for the merchandise or general purpose of the contract only, or with the collateral benefit as one of the principal inducements. In Massachusetts, where the common law definition of insurance has been incorporated into the Insurance Law, a promise to release the balance due in an installment purchase on the death or disability of the purchaser was held to be a contract of insurance. The defendant company was selling furniture on the installment plan and agreed that the purchaser, if he was the head of a family, died or became unable to work during the contract period, the balance of the purchase price would be released. The court quoted the Massachusetts definition, substantially that of the common law, - an agreement by which one party for a consideration promised to pay money or its equivalent or to do an act valuable to the insured upon the destruc-

tion, loss, or injury of something in which the insured has an interest. Atty-Gen. ex rel. Monk.Ins.Comm. v. C.E.Osgood Co., 144 N.E. 371.

In Commonwealth of Pennsylvania ex rel. Hensel v. Provident Bicycle Ass'n, 178 Penn.St. 636, 36 Atl. 197, a mutual association which accumulated funds derived from fixed annual dues and periodic assessments on the members, who became entitled to have their bicycles cleaned twice a year, a bicycle supplied during the time a search was being made for the owner's if stolen, replacement of stolen bicycles, and repairs in case of accidents, was held not to be engaged in the business of accident insurance. The court took the view that the first benefit was the only certain one and that the consideration must have been principally for that. Although this case is cited often, it is doubtful that any court would go further in allowing contracts with contingent benefits to escape the restrictions of the insurance regulations.

Contracts calling for the cancellation of a debt in case of death or other extrinsic events are uniformly held to be insurance. A contract calling for the defendant to furnish the holder's burial in consideration of the latter's paying weekly installments of a small amount until $200 had been paid and providing that in event of the holder's death before the stipulated amount was reached the balance of the installment would be remitted and the funeral furnished was held to be a contract of insurance on the ground that the advantage to the estate of the obligee and the disadvantage to the obligor of the former's dying before the $200 was paid distinguished the contract as one of insurance. Ruto v. Italian Burial Casket Co., 104 Pa. Super. Ct. 288, 158 Atl.657. A contract for the sale of land which provided that in event of the death of the vendee during the term of the contract the vendor would convey the property free from all encumbrances, to his executor or administrator and cancel the obligation, provided the vendee had made his payments up to his death on time. The defendant was obligated to convey a substantial interest to the purchaser in the event of his death prior to the expiration of the agreement which undoubtedly embodies the purpose and function of a life insurance policy. Barna v. Clifford Country Estates, Inc., 143 Misc.813. But where in a similar contract, on the death of the vendee the vendee's representative had the option of continuing the payments or rescinding the contract, and if there was a rescission the seller had the option of refunding the payments with interest or of conveying the premises to the vendee, the vendor was held not to be engaged in the insurance business. Since the buyer's representatives had control over the question of whether the contract would subsist or be at an end, the alternative right of the seller to convey the property rather than to pay the money back was not a violation of the insurance law. If anything, the return of the property would probably be a disadvantage to the vendee because if the company was willing to relinquish it, the land was probably worth less than the cash already paid. Saltzman v. Fairbank Realty Corp., 145 Misc. 478, 260 Supp.334. United Security Life Ins.& Trust Co. v. Bond, 16 App.D.C. 579 and Missouri K.& T.Co. v. Krumseig, 77 Fed.32, are cases where loans to be cancelled on the death of the borrower were held to be contracts of life insurance.

Where the contingent event would not have been detrimental to the second party if he had not entered the contract or if it arises directly from the performance of the contract it is usually beyond the restrictions of the insurance laws. The object of these contracts is commonly to make the promisee feel more certain of the main

benefit he contracts for. Thus in French v. Vix, 2 Misc.312, a contractor stipulated to indemnify the owner for damages to passers-by or the persons or property of neighbors during his performance of the contract. This was not a contract of insurance. The object of the owner was to secure a new building and still be free from the necessity of contesting or otherwise disposing of claims arising from the performance of the contract. This contract was not insurance of third persons because the owner wished to protect himself against claims, rather than others against injury.

A contract by a lightning rod dealer that the rods would protect the building for a certain term of years and undertaking to make good all such intermediate damage as might occur by lightning during that term, not exceeding a certain amount, was a warranty of fitness for purpose of the goods and not of insurance. Cole Bros. v. Haven, 7 N.Y.383. The purchaser was merely being assured of certain performance by the rods for his money.

Where a lessor of a chattel agreed that in case of injury or destruction of the chattel by fire he would restore it to its original condition or replace it, he was guaranteeing the lessee's continued enjoyment of the use of the chattel for the contract period and not insuring the chattel, Re Fire Certificate, 39 Pa.Co.Ct. 163. However, an undertaking by one furnishing materials for a voting contest that if the sales were not increased by the contest so that 3-1/2% of the total sales would equal $400, the amount paid for the materials, he would pay the difference in cash, was held to be a contract of commercial insurance. The court said it was not one of guaranty because it was not to answer for the debt, default, nor miscarriage of another, and not of suretyship because the obligation was not secondary and successive. National Sales Co. v. Manciet, 83 Ore.34, 162 Pac. 1055.

In Sisters of the Third Order of St. Francis v. Guillaume, 222 Ill. App. 543, a hospital corporation, in consideration of $4,000 to be paid, agreed to receive and care for Mrs. Guillaume during her lifetime. The patient died within a week after entering the hospital and her executor sought without success to resist payment of a note given for part of the fee on the ground that the contract was one of insurance and therefore ultra vires of the hospital corporation. This contract was in the category of contracts for contingent services, like a yearly retainer of a lawyer. Furthermore, the subject matter of the contract was the health of the patient where in the other cases conditioned on a death it was not. Stern v. Rosenthal, 71 Misc. 422, was decided not to be concerned with insurance on the additional ground that the element of a risk insured against was missing. The defendants hired the plaintiff for an indefinite period to make up into trousers material supplied by the defendant, and in consideration of a 1% deduction in the contract price agreed to pay the plaintiff the value of the labor put upon the material if it should be damaged or destroyed by fire. The defendant stood in the position of pledgors of goods to be worked upon. They were obligated to pay the plaintiff for his work whether the goods were destroyed or not so there was no risk on their part. The agreement was probably made to obviate any question of the liability of the defendants and the deduction of 1% from the plaintiff's compensation did not alter the essential character of the contract between the parties.

Where attempts are made to evade the insurance laws by using subterfuges to cloak the real nature of the transaction, the courts will discard the form of the transaction and scrutinize its substance.

One such contract provided for the care for a fixed term and a certain consideration of plate glass and in event the glass was broken during the period of the contract the defendant agreed to replace it. There was also an agreement to keep the glass puttied in the frame and for inspection. No plate glass owner would enter such a contract for the purpose of keeping his window glass puttied. His object would be to secure protection against breakage. The agreement to inspect the glass and to keep it puttied was to the contractor's advantage, since it reduced the risk. People v. Standard Plate Glass & Salvage Co., Inc., 174 A.D.501.

A Massachusetts court stated that in no case does the time or amounts of the payments by the assured nor the modes of estimating or securing the payment of the sum to be paid by the insurer affect the question of whether the contract is one of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the insurance upon the happening of the injury to the subject by a contingency contemplated in the contract. Comm. v. Weatherbee, 105 Mass.149.

The promise of a "Realty Revenue Guarantee Corporation" to a farmer whereby the latter in consideration of a premium paid acquired an option to sell the produce of certain land at $5 per acre, and a promise by a newspaper to pay a certain amount to the representatives of one accidentally killed while a copy of the newspaper or a coupon clipped from it was in his possession were both insurance contracts. State v. Hogan, 8 N.D.301, 78 N.W.1051. Commonwealth v. Phila.Inquirer, 15 Pa.Co.Ct.Rep. 463.

Under one scheme a company sold contracts, numbered in consecutive order; each holder promised to pay a membership fee of $3 and $1.35 up to and prior to the maturity date of the contract; $1 of the $1.35 was credited each month to the holder and when the total of the amount credited to him and to all holders of subsequently numbered certificates reached $50, the particular contract was deemed to be matured. Then the holder had the option of receiving installments of $50 per month to be applied on payment for a home until the full sum of $1000 was paid. The holder exercising this option had to pay $5.35 per month after the maturity date, being credited with $5, and the lien of the company on his home was released when the $10 and $5 payments to his credit totaled $1000. Up to this point the contract was not one of insurance, but a further provision provided that in case of the death or disability of the contract holder before the $1000 was paid, the lien would be discharged and the title conveyed to the wife or heirs of the contract holder. Persons over 50 years of age could not take advantage of this clause. The agreement to build a house did not alter the fact that essentially the contract was one of life insurance State v. Beardsley, 88 Minn.20.

The practice of railroads maintaining relief departments, to which employee members contribute, waiving all claims against the railroad, and the railroad makes up deficiencies in the fund, from which members or their representatives are paid in case of accident or death, has uniformly been declared not to be participation in the business of insurance. The contract for these contingent benefits, though separate, is a mere incident of the main contract of employment. Vance On Insurance, 2nd Ed. p. 62. The leading case on that question in New York - Colaizzi v. Pensylvania R.R.Co., 208 N.Y.275 - held that since the contributions of the employees were consistently inadequate the company was not engaged in the business of life insurance on the co-operative or assessment plan.

JOHN ROSS

THE BANK COLLECTION CODE - A COMPARISON

Andrew V. Clements

PART I

The Bank Collection Code was adopted by New York in 1929. The Code is set out as Article 19-A of the Negotiable Instruments Law. It is now the law of nineteen or more states. The celerity with which it has been adopted may be due to a misapprehension. The Code was prepared by the American Bankers Association and not by the Commissioners on Uniform State Laws. Designating it as one of the "uniform laws, as has been done in a few recent decisions, is incorrect. The Commissioners on Uniform State Laws have been considering a proposed Uniform Bank Collection Act for some years. The fifth tentative draft was submitted to the National Conference of the Commissioners a the 1934 meeting. A final draft has not been submitted. Upon submission of the proposed Act to the State Legislatures, the differences in the adopted and the proposed statutes will be apparent, with resulting lack of uniformity rather than desired uniformity. As the drafting committee of the National Conference has reported (Handbook, 1934), an effort must be made to bring the various elements in the situation into agreement. A brief comparison of the adopted Code with the proposed Act may be helpful. "Code" as hereafter used, refers to the adopted statute, and "Act" refers to the proposed statute as drafted by the Commissioners onUniform State Laws.

Definitions.- The Code, §350(a) defines "bank" as any person, firm or corporation engaged in the business of receiving and paying deposits of money within this State; with a branch or office of any such bank being deemed a bank. The Act does not contain "within this State", thus eliminating uncertainty of status of a branch of a bank not receiving deposits "within this State." "Item" is defined by the Code, §1(b) as any check, note or other instrument providing for the payment of money. It is defined by the Act, §1, as any negotiable instrument or any non-negotiable evidence of an obligation for the payment of money. Both definitions are sufficiently broad to include all contracts of whatever nature, so long as they represent an obligation for the payment of money, as, for instance, a matured life insurance contract. It would seem that the definition should be restricted to paper customarily and usually handled by banking institutions. The Act proceeds to other definitions, all missing from the Code, notably "bank of payment" - "collecting bank" and "customer", and gives a distinct aid in interpretation by providing that the term of the Act, except the term bank, which are identical with terms in the Negotiable Instruments Law, have the same meaning as such terms have in that Act and any present or future amendments thereto.

Bank as Collecting Agent.- A definite agency relation of the bank of deposit is established by §350-a of the Code. Unless otherwise agreed, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collectio and each subsequent collecting bank shall be sub-agent of the depositor, until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank. But if the bank of deposit receives the paper unrestrictedly endorsed it becomes liable as owner to subsequent parties who act in reliance upon its ownership unless it protects itself as provided in §350-c. The

agency relation is to continue, even though the bank has permitted withdrawals against the item, except the bank shall have all the rights of an owner to the extent of the amount withdrawn.

The purpose of this section is to treat the bank of deposit as an agent, for the purpose of avoiding liability for correspondents, and, on the other hand, to give the bank the rights of an owner of the deposited item, thus overcoming the effect of City of Douglas v. Federal Reserve Bank, 271 U.S.489, 46 S.Ct.554. As no test is given to determine when it has been "otherwise agreed", this has already been variously interpreted. (Farmers Exchange Bank v. Farm & Home Savings & Loan Ass'n, 52 S.W.(2d) 608; Lawton v. Lower Main St.Bank, 170 S.E. 469). Where drawings have been allowed against an uncollected item which has been sent on to a correspondent, which in turn is an agent of the depositor, we thus have a situation where the bank of deposit is part owner and also agent and the further possibility of the correspondent bank being considered a part owner to the extent of the withdrawal. When is credit given, and when is it "unconditional"? The point of time is important, but the Code gives no aid in ascertaining that fact. "Unconditional" must mean credit that cannot be withdrawn, or irrevocable credit, but in §350-b we find the phrase "provisional credit", so that the nature of the credit given must be measured by both terms. (Nat. Bank of United States, 243 A.D.298, 277 Supp.96).

The Act applies three categories: Purchase, provisional purchase, and agency. Where no credit has been given, items having been deposited or presented for remittance or credit upon collection, or for purchase but refused, or as collateral security, or restrictively endorsed, the purpose of §18 is to regard all such paper as handled on a pure agency basis. Items offered by a customer having an account, other than those payable at or by the bank, are deemed offered for immediate credit unless the contrary is shown, and upon credit being given the bank will be considered a purchaser. In the case of checks, the credit will be considered provisional. A deposit by one without an account will be deemed for collection and remittance. These provisions of §16 appear to follow naturally from the actual relation of bank and customer and do not inject an artificial rule creating a status inconsistent with the facts.

The intermediate category of provisional credit in the case of checks receives further consideration in §21, by which the credit is made available to the customer upon receipt by the bank of the proceeds of the items. But in all cases where the customer is permitted to draw, irrespective of the nature of the credit originally given, the bank will be deemed to have given value to the extent of the withdrawal under §22. To determine the actual value given, the rule adopted is that of first money in, will be deemed first paid out. The selected rule accords with the weight of authority. (Merchants Nat'l Bank v. Santa Maria Sugar Co., 162 A.D.248, 147 Supp.498)

The point of time when credit is given, uncertain in the Code, is fixed by the Act, §5, as the time when the bank makes a credit entry in the usual records, whether entered short or provisionally, and although not so entered, when advice of credit is sent by the bank or when entry is made by the bank in the customer's bank book or deposit slip. Thus the time element, as an objective fact, may be readily ascertainable by the acts of the bank. It is claimed by the Commissioners that the effect of including provisional or short entry

in this section is to differentiate the deposited check more clearly from theordinary transit item where no credit entry of any sort is made in the forwarder's account upon receipt of the item.

Item on Same Bank.- By §350-b of the Code, credit given for an item drawn upon or payable at the bank of deposit shall be provisional and subject to revocation at or before the end of the day of deposit, if not payable for any reason. As to a similar deposit after banking hours, the right is exercisable the next business day. This changes the settled rule of the common law that credit given for a deposited item drawn on the bank of deposit constitutes final payment, (Oddie v. National City Bank, 45 N.Y.735) and expresses the reasonable opini on that banks should have an opportunity to examine the state of the drawer's account. Items drawn upon a branch bank deposited with another branch of the same bank would not come within this section, nor the corresponding section of the Act, since a branch is defined as a separate institution. There is also support in the common law for viewing the branch bank transaction as a collection and not a payment. (Chrzanowski v. Corn Exchange Bank, 173 A.D.285, 159 Supp.385).

Although not so stated, the above Code section is intended to apply only to over-the-counter presentment. The Act, §7, so provides. Should a bank which has accepted or certified or issued the item presented, be given an opportunity to examine the state of accounts, or should it be required to honor or dishonor upon presentment? The necessity for provisional credit only for such items is not apparent, and §7 of the Act expressly excludes them. May the bank revoke the credit given, within the permitted time, "for any reason" as the Code apparently authorizes? This right, of a rather extreme nature, is probably based upon the accepted rule that the drawee bank, unless it has certified or accepted the item, is under no obligation to the payee. In fairness to the depositor, the right to charge back or return the item should not in all cases be a matter determinable solely by the bank. The Act, §10, details six instances when the right so to do may not be exercised, all of which must occur subsequent to payment: - where court process has been served relative to the drawer's account; or a stop-payment order received; or an adverse claim asserted; or notice of death or incapacity of the drawer; or the insolvency of the drawer; or the closing of the bank of payment.

Endorsements.- The exact nature of several kinds of endorsements, commonly used but not clearly within the definition of a restrictive endorsement as contained in §66 of the Negotiable Instruments Law, has occasioned irreconcilable decisions and created confusion among the banks. Endorsements for collection, invarious forms, have been held restrictive, title remaining in the depositor. (National Butchers' Bank v. Hubbell, 117 N.Y.384). Endorsements for deposit have been considered restrictive and also as title-passing. (Johnson v. Donnell, 90 N.Y. 1; Cohn v. Trade Bank of N.Y., 146 Misc. 771, 262 Supp.797; Security Bk.v. Northwestern Fuel Co., 58 Minn. 141, 59 N.W.987). The majority of the courts have held the "pay any bank, banker or trust company" endorsements to be non-restrictive. (Interstate Trust Co. v. U.S.Nat'l Bank, 67 Colo. 6, 185 Pac.260, 10 A.L.R.705).

The Code, §350-c, places all three types of endorsement in the restrictive category, but the "pay any bank or banker" endorsement may be coupled withwords indicating a trustee relationship. This was done in Matter of Internat'l Milling Co., 259 N.Y.77. The restrictive endorsements under this section are to be accompanied by a guaranty of genuineness and authority to make prior endorsements

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and to save the drawee harmless in case of defective or irregular endorsements.

Where the deposited item is payable to bearer, or endorsed specially or in blank, the agency relation between depositor and bank shall nevertheless continue but subsequent holders have the right to rely on the presumption that the bank of deposit is the owner. The right of reliance given to subsequent holders accords with the settled rule. (Park Bank v. Seaboard Bank, 114 N.Y.28). To protect the bank of deposit, or any bank in the collection chain, from liability as the apparent owner for loss occasioned by forgery or alteration, the right is given to write over a blank endorsement words indicating an agency relation.

A directly opposite position is taken by the Act. The effect of the corresponding provision, §2, is to insure recovery to the drawee in case of forgery or alteration, as is done where a prior endorsement has been forged. Items endorsed for "collection", - "collection and credit" - "collection and remittance" or for "account" of someone other than the endorser, are deemed restrictively endorsed. But items endorsed for "credit" - "deposit" - "pay any bank, banker or trust company", or for "account" of the endorser, are not restrictively endorsed and do not give notice or evidence of an intent to create an agency or trust relation. It is very doubtful whether the protection sought by the banks in the Code will be afforded by merely designating the endorsements restrictive unless in addition the banks actually withhold credit until the items are collected. (In re Kountze Bros., 79 Fed.(2d) 98, 102 A.L.R.367).

Duty of Banks.- The Code, §350-d, adopts the "due care" or Massachusetts rule, placing upon each bank - the bank of deposit and each subsequent bank in the collecting chain - the duty to exercise ordinary care, with liability for its own acts only. Some uncertainty is injected into the situation by the provision that when such duty is performed the agent bank shall not be responsible if for any cause payment is not received. Whether ordinary care has been exercised will usually be an issue of fact. (Florida Citrus Exchange v. Union Trust Co., 244 A. D. 68, 278 Supp.513).

The Act, §§27, 28, 33, more clearly states the common law on the point, and continues with a provision concerning liability in case of lack of care. The bank in handling all items, including accompany documents, is held to follow the customers' instructions and, in any case, to handle the item in a manner consistent with reasonable care and diligence. For failure to exercise the requisite care, the bank shall be liable for all losses directly and naturally following therefrom and for the purpose of determining the loss, the obligation of any person whose signature appears upon an item shall be presumed to be worth the face value of the item. Support for the latter rule is found in Joseph Mogul, Inc., v. C.Lewis Levine, Inc., 247 N.Y.20. The sale of goods consummated by payment or acceptance of a draft for the release of documents is brought within the rule by imposing liability upon the bank, to the extent that the buyer is liable to the seller, if the bank without authority permits inspection of the goods, followed by the buyer's refusal to accept or pay for the same.

Should the bank sell the paper to its correspondent, or send it for credit to the forwarder's account, the bank shall be liable to the depositor, by §33, for any loss subsequently occurring, notwithstanding any stipulation on its part to the contrary. This will prohibit the bank from continuing the agency relation with its customer when

it is in fact the owner of the item. Since the adoption of the Code, relieving the bank of deposit from liability for the acts of its correspondents, it has been assumed that the first bank would nevertheless be liable if it selected an irresponsible or careless correspondent. This is forumlated by rule, §34 of the Act, a provision not found in the Code.

Presentment and Forwarding.- The clear weight of authority is to the effect that it is negligence to forward an item to the drawee or payor bank. (National Reserve Bank v. National Bank of the Republic, 172 N.Y.102). But banks for years have been operating contrary to the judicial rule, and it is only the unusual case where loss occurs because of direct presentment. Where this happens, the depositor is given a remedy by §350-1. The Code, §350-e, permits direct presentment, or indirect, as through another bank in the same locality, and presentment of local items either direct or through the local clearing house. Out of town items are to be forwarded not later than the next business day following receipt. The methods designated are not exclusive, and any other method which would constitute due care is permitted. The Act is substantially similar, the main difference being that the two classes of items - local and out of town - are separated, the former being covered by §29, and the latter by §31.

Payment of Mail Items.- It is provided by §350-f of the Code that where the item is received by mail a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer. The bank has time to ascertain its position before paying or giving credit, an opportunity it does not have in over-the-counter presentment, so there is no necessity for a provisional payment period. The actual time when an item presented by mail has been paid has been an uncertain question. Is payment effected whenthe drawee or payor bank charges its customer's account, or when the bank remits its own draft or the draft of another bank, or when such remittance draft has in turn been paid? In seeking the meaning of §350-f the effect upon it of a subsequent Code provision, §350-j must be considered. By the latter section a correspondent bank which has forwarded an item by mail to the drawee or payor bank, receiving a remittance draft, or an unrequested credit, or receiving no remittance nor credit, may elect to treat the item as dishonored even though it has been charged to the account of the drawer or maker. Thus we may have a situation where the item has been charged to the maker, cancelled and returned to him, a remittance sent by the drawee bank to the forwarder, and still the maker's liability continues. It may properly be asked, when is the item "finally" charged? As the Code contains no test for determining finality, it would seem that certainty, in point of time, has not been achieved.

The Act selects the first point of time capable of being most easily proven as the time when payment is made. An item is deemed paid by §12 when, in the case of an item made or accepted payable at such bank, the bank of payment receives any agreed equivalent as payment; or when the item is charged against the proper account of the drawer, maker or acceptor, though such charge creates an overdraft; or when credit is given or a remittance made as may be authorized by the customer. Should credit or remittance for the item be set aside as a voidable transfer, or should the bank close without acting upon the item, it shall be deemed dishonored by non-payment, except that where the bank takes no action within the usual time, the holder may elect to treat the item as paid and, by notice, claim directly

against the closed bank. This right of election will be referred to in connection with Code §350-j.

Further, the bank is obligated to pay mail items, by remittance or credit, promptly, on the day of presentment, under §11 of the Act. The purpose is to prevent the bank delaying the transaction until the drawer's account is exhausted by other charges against it. There is support for this position in the authorities. (Standard Trust Co. v. Nat'l Commercial Bank, 240 Fed.303; Baldwin's Bank v. Smith, 215 N.Y.76).

Items Lost in Transit.- Where an agent bank forwards an item for collection, it shall not be responsible for its loss or destruction in transit, nor, when in the possession of others, for its inability to repossess itself thereof, provided there has been no lack of ordinary care on its part. Code §350-g.

The corresponding provision of the Act, §35, makes no reference to the forwarder's inability to repossess items, and expressly includes relative documents accompanying items and instructions pertaining thereto. Both Code and Act sections are applications of the general rule found in Code §350-d and Act §27.

(PART II will appear in the June issue)

QUESTIONS AND ANSWERS DEPARTMENT

The following questions are taken from cases presented in this issue, and from other cases of interest. All legal topics are included, and present a fair method by which you can test your own legal knowledge or that of others. Compare your answers with those given on Page 114 of this issue.

1. A manufactures produce by means of non-union labor. B, who employs no help, sells such produce at retail. To enforce its demands against A, a labor union pickets in a peaceful manner B's shop. May B enjoin such action?

2. Is a company which agrees to inspect and care for plate glass and to replace it if broken during the contract period, selling a contract of insurance?

3. A person dressed as a policeman approaches defendant and asks him to aid him in arresting A. Defendant does so. The policeman turns out to be an imposter and there was no authority to arrest A. Is defendant guilty of kidnapping?

4. A national distributor of goods, accustomed to draw upon purchasers for the contract price, desires to obtain collection of the drafts, with direct liability to the drawer if collected, and as much protection as possible in case of insolvency of the collecting bank. How may he accomplish this?

5. A check drawn by D on A Bank in the town of X, is deposited by the payee in B Bank inthe town of Y. The item is sent by B Bank to A Bank for payment. A charges D's account, cancels the item, and draws its remittance draft to B Bank's order, on C Bank, in which it has an account. The remittance draft is properly presented to C Bank but is not paid, as C Bank is closed for insolvency. B Bank promptly notifies A Bank, and D. Is D discharged from liability on his check?

WENDEL KIDNAPPING - EVIDENCE OF BELIEF TO SHOW INTENT

Echoes of the Lindbergh kidnapping were recently heard when the Court of Appeals handed down its decision in a case growing out of that bizarre episode which came as the anti-climax to "the crime which stirred a nation", -- the so-called Wendel kidnapping. The facts in the case - People v. Weiss, 276 N.Y.384 - were substantially as follows Parker, Sr., a private detective, suspected or pretended to suspect Paul Wendel as the kidnapper and murderer of the Lindbergh baby. He made his suspicions known to the defendants and enlisted their aid in solving the crime. Acting under Parker's orders, but without any actual authority, the defendants seized Wendell and kept him prisoner, torturing and abusing him until, unable to endure the indignities and punishment inflicted upon him by the defendants, he signed a confession which he immediately repudiated and which the authorities shortly thereafter rejected.

On the trial for the kidnapping, one of the defendants took the stand and the following questions were put to him: "Did you desire to help a detective solve any part of the Lindbergh mystery at that time?" and "Did you think at that time that you were taking part in some noble work?" Objections to both questions were sustained, the Court remarking: "That does not affect the question of his innocence or guilt, what he thought about those matters." All other attempts by the defense to prove that the defendants believed Wendel's arrest was made with authority of law were similarly excluded.

The defense had previously challenged the sufficiency of the indictment on the ground that it did not charge a crime because it failed to allege a specific criminal intent; and, in offering the excluded evidence counsel for the defendants was in effect raising the same question; for, if one of the elements of the crime of kidnapping is a specific criminal intent, such intent is a fact in issue and consequently evidence showing absence of such intent would be admissible. To decide, therefore, whether the Court erred in excluding the evidence necessitates an inquiry into the nature of the criminal intent which is required to constitute the crime of kidnapping.

Every crime, of course, requires criminal intent, but not every crime requires an intent of the same quality; and in order to appreciate the full significance of the question involved, it would be well to recall the distinction between a general and a specific criminal intent. Excellent instances of the former are found in the old cases dealing with sales of liquor to minors. Good faith or an honest belief that the purchaser was of full age availed the defendant nothing; and even where there was a reasonable basis for such belief the defendant was convicted. The defendant, reasoned the Court, intended to sell liquor to a particular individual. That person was in fact a minor. The defendant, having intended to sell liquor to such person, is therefore deemed to have intended to sell liquor to a minor. In such cases a criminal intent is inferred from the mere doing of an act which in fact is wrongful.

A specific criminal intent, on the other hand, cannot be inferred from the mere doing of an act. It must exist as a separate and independent fact (except, of course, where the act done is so wanton and wilful in nature that a person is deemed to have intended the natural consequences of his act). Murder, for example, requires a specific intent to produce death, and where such intent is lacking there is no

murder. A person, therefore, who picks up what he believes to be an unloaded gun, pulls the trigger and kills another has not committed murder because he had no intent to produce death. Yet he, like the bartender who sold the liquor, knew what he was doing: he knew he was handling a gun, he had the intent to pull the trigger, and his act resulted in death. Good faith in this case, however, is a valid defense to a charge of murder because murder requires a specific rather than a general criminal intent, and in the instance given there is no criminal intent which has an actual existence in fact. It should be noted that in crimes of this character it is the intent which makes the killing murder.

In deciding, therefore, the question of the admissibility of the evidence offered, the Court necessarily had to determine which of the two types of criminal intent is an element of the crime of kidnapping. In other words, is kidnapping, like murder, a crime which requires a specific intent (to kidnap) existing independently of an intent to do a particular act (i.e., to seize Wendel); or is it, like the selling of liquor to minors, a crime in which the mere commission of the act is sufficient, regardless of any actual intent to do wrong (i.e., is the mere seizure of Wendel sufficient)?

The Appellate Division unanimously sustained the trial court on the ground that the defendant's offer was to prove motive, which is not an element of the crime. Quoting the classic discussion of the subject of intent in People v. Molineux, 168 N.Y.264, 297, the Court refers to the oft-drawn but difficult-to-apply distinction between motive and intent. "Motive", repeats the Appellate Division, "is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. Therefore affirmative answers to the excluded questions," concludes the Court, "would not negative an intent to confine Wendel against his will, but would tend to show that appellants were actuated by honorable motives." In substance the holding was that the intent to seize Wendel together with the fact of the unlawfulness of the imprisonment were sufficient to constitute the crime of kidnapping.

This, it is apparent, entirely misses the real question in the case; for the actual issue is not one of intent and motive, but rather one of the quality of the intent required to constitute the crime of kidnapping. In offering to prove his good faith (which superficially seems to be motive) defendants were not attempting to prove that they were prompted by honorable motives in acting as they did. Rather, they were trying to prove the character of the purpose which they had when they seized Wendel, i.e., whether they seized him with intent to do so lawfully or whether they seized him with intent to do so without authority.

The Court of Appeals did not fail to recognize the real question involved, but there was a difference of opinion as to the solution, the four prevailing judges holding that kidnapping requires a specific criminal intent. The basis of this conclusion is found, as it needs must be, in the wording of §1250 of the Penal Law which defines the crime. "A person," reads the section, "who wilfully seizes..... another with intent to cause him without authority of law to be confined .....is guilty of kidnapping." To make out the crime, therefore, it is necessary to prove that the defendant wilfully intended, without authority of law, to confine another. To show merely that the defendant intended to seize another and that the seizure was without authority in fact proves only that a tort, not a crime, was committed, the essential difference between the tort and the crime being that

the latter requires not only an intent to seize but also an intent to seize without authority. That is, civil liability only is attached to a seizure (though under a mistaken belief that the defendant had authority so to seize) which turns out to be without authority in fact, as under a warrant of arrest void on its face. Since the prosecution had to prove that defendants intended to seize Wendel and to do so without authority of law, the defendants were entitled to show that they believed they were acting within the law; for if they so believed, there could have been no intent to act "without authority of law." Their belief or disbelief indicates intent or lack of it.

Though three judges dissented, there is little that can be said for the minority opinion. The point of view there expressed can be summed up in one sentence: "Where one is seized and confined and it turns out that the person doing it had no legal authority to do it, the crime of kidnapping is committed." This definition of the crime is based on (and the dissenting opinion quotes) §28 of the Revised Statutes the wording of which is different from §1250 of the Penal Law. The old section reads: "Every person who shall without lawful authority seize forcibly....any other....with intent...to....confine....unlawfully," is guilty of kidnapping. The emphasis, here, it will be noted, is on intent to confine unlawfully, while the Penal Law stresses intent to seize without authority. The minority, however, refuses to recognize the change in the statute and consequently gives it no effect.

There should be no hesitation in accepting the majority opinion. It states the better rule of law not only because it gives effect to the change in the wording of the statute, but principally because it leaves room for a distinction between the tort of false imprisonment and the crime of kidnapping. No such distinction can be made if the minority view is accepted because the definition above quoted is identical with a definition of the tort of false imprisonment. It requires only a general criminal intent (to confine unlawfully) and, since such intent is inferrable from the mere commission of the act, the crime is complete "where one is seized and confined and it turns out that the person doing it had no legal authority" (to repeat the above quotation). This definition, requiring, as it does, only the elements of seizure and lack of authority, is a precise description of the tort.

JOSEPH AARON WOOLMAN

EXAMINATION BEFORE TRIAL - WHEN OBTAINABLE

It is the more or less common understanding of the members of the legal profession that an order for the examination of an adverse party before trial can be obtained only when the person seeking the order has the affirmative of the issue, and that even then the order will be granted in the court's discretion only as to those issues to which the party has the affirmative.

This fallacious belief no doubt continues to exist primarily in the minds of those of the profession who practiced under the Code of Civil Procedure, under which the right to an examination before trial was hedged with many restrictions. When the old Code was discarded and the new Civil Practice Act adopted it was the intent to do away with the restrictions which had theretofore been set up by the courts.

The Civil Practice Act, §288 says, "Any party to an action in a court of record may cause to be taken by deposition, before trial, his testimony or that of any other party which is material and necessary in the prosecution or defense of the action."

Clearly it was the intent of the Legislature in adopting this Section to liberalize the practice. But this was not the immediate result. The courts in the exercise of their discretion continued to place limitations upon this Section when there were no words of limitation to be found in the Section except that the deposition must be material and necessary to the prosecution or defense of the action. The court said in Zeltner v. Fidelity & Deposit Co. of Maryland, 220 A.D.21, 28, that the purpose and effect of the provisions of the Civil Practice Act concerning examinations before trial is to extend to one examining a witness or a party, corporate or otherwise, the right enjoyed on the examination under the Code. Shaw v. Samely Realty Co.Inc., 201 A.D.433, 436, said on the subject of examination before trial: "No new situation has resulted from the passage of the Civil Practice Act and the adoption of the new Rules of Civil Practice."

Carmody's New York Practice, 355, says of those sections of the Code relating to examinations before trial and to discovery and inspection: "While these sections have not been taken over in the Civil Practice Act in the language in which they were found in the Code, the substance of them has been continued and it seems evident that the purpose of the framers of the Civil Practice Act was not to cut down the right of examining under oath one's adversary in advance of the trial, nor to enlarge it, but to preserve it merely, and to make more easy and simple the procedure by which it was to be exercised."

Hersig v. Washington Fire Insurance Co., 144 A.D.174, was an action on a fire insurance policy. The answer set up two affirmative defenses, one that the insured made false and fraudulent proofs of loss, and the other that he swore falsely and produced fraudulent proofs upon an examination had pursuant to the terms of the policy. Plaintiff sought an order for the examination before trial of defendant for the purpose of avoiding these affirmative defenses. The court said, at page 175, "The courts are at present disposed to grant orders for the examination of adverse parties with great liberality, even to the extent in some cases, of permitting a plaintiff to examine

the defendant as to an affirmative issue, but it still remains necessary that the evidence to be elicited is of such a character that it may be necessary and material to the moving party, and that he intends to use it upon the trial, but it is only in rare and exceptional cases if at all, that the court will permit a plaintiff to pry into his opponent's defense merely for the purpose of 'avoiding' it at the trial." It will be noted that this case came under the old code.

Thus it will be seen that the courts were extremely reluctant to grant examinations before trial. And for a time under the Civil Practice Act the courts continued to cling to the old rule which often injected an element of surprise into a trial and placed a premium on the cleverness of counsel rather than on the justice of the cause.

In 1933 the Court of Appeals, in Public Nat'l Bank v. Nat'l City Bank, 261 N.Y.316, opened the door to a more enlightened policy as to this practice. The court said: 'The right to examine a party before trial is not made dependent as matter of law upon the purpose or necessity to use his evidence to establish an affirmative claim or defense. It is discretionary with the courts to permit an examination of a party, even where the burden of proof is entirely with that party. Thus, a defendant may, under proper conditions, have an examination of a plaintiff, even though the answer contain no affirmative defenses and only general denials. In other words the matter is discretionary with the court, although we recognize the wisdom of the practice adopted in the Appellate Divisions for the guidance of this discretion and which confines the examination of a party to the occasion where it is necessary or useful in establishing the plaintiff's case or an affirmative defense, thus preventing the so-called fishing expedition to get evidence."

In Brand v. Putts, 242 A.D.151, the court said: "The right to an order permitting depositions to be taken is not absolute but rests in the judicial discretion of the court or judge. Under our present practice the right to examine an adverse party is practically unrestricted. The court, in its discretion, may, at the instance of a party litigant, order a general examination of his adversary before trial, and need not limit the examination to an issue on which the moving party has the affirmative.

To the same effect is Combes v. Mass., 209 A.D.330.

The latest case to be decided by the Third Department on the subject is Breault v. Embossing Co., Inc., 253 A.D.175, in which the court speaking through the eminent jurist, Mr. Justice Heffernan, said, "We have recently held (Brand v. Putts, supra) that the right to examine an adverse party is practically unrestricted. All the older authorities on the subject are no longer valuable as precedents. No longer need the examination be limited to those issues upon which the moving party has the affirmative. The right to examine a party before trial is not made dependent as a matter of law upon the purpose or necessity to use his evidence to establish an affirmative claim or defense. An application to examine an adverse party should not be denied where it is necessary or useful in establishing a cause of action on behalf of the plaintiff or an affirmative defense on the part of the defendant. The time has come when courts should let it be definitely understood that the practice of examining an adverse party before trial should not be hampered by technical requirements so long as the inquiry is directed to relevant issues. The power to permit a general examination exists and the exercise of such power lies in

the discretion of the court. The trend of present day thought is to permit great liberality in such examinations. The court reserves to itself at all times the power to prevent so-called fishing expeditions in order to obtain evidence."

No words could better point out the great strides which have been made in the liberalization of the practice.

On the whole it is our opinion that heretofore justice has placed a premium on surprise and trickery. This should no longer be the case. The old practice led to unfair practices which under the new should be eliminated.

THOMAS DENNIS NOLAN

N O T E S

NEGOTIABLE INSTRUMENTS - FRAUDULENT IMPERSONATION - NECESSITY FOR PRIOR DEALINGS BETWEEN DRAWER AND IMPERSONATOR.- The importance of the mere physical presence of an impostor, as bearing upon the intent of the defrauded person to deal with the impostor, himself, rather than with the person whom he represents himself to be, has been qualified in the recent case of Cohen v. Lincoln Savings Bank, 275 N.Y.399. Heretofore, the mere face-to-face dealing with the impostor was sufficient to show that intent. Now, it must be shown that the victim had prior dealings with the impostor which culminated in the final transaction.

The facts of the Cohen case are undisputed. The City of New York made an award in a condemnation proceeding to Harry Wolter. Abrams, a dealer in such awards, offered to sell plaintiff an award. Plaintiff's husband, acting as her agent, received her check, endorsed in blank, to pay for the award. On the day set for closing, the parties met at Abrams' office where an impostor was introduced to plaintiff's husband as Harry Wolter, the owner of the award. Plaintiff's husband handed the check to Abrams and said, "Assign this check to the proper owner and deliver the assignment of the award to my attorney." He saw Abrams write on the check, "Pay to the order of Harry Wolter." Plaintiff's husband then left the office. Except for the brief time taken up in the introduction, he had no dealings with the impostor. The impostor endorsed the check in the name of Harry Wolter and the defendant paid it and charged the amount against plaintiff's account. Plaintiff sued for the amount so charged claiming it had been paid under a forged endorsement since it was not endorsed by the payee intended. The court so decided.

In fraudulent impersonation cases, the drawer may be said to have a double intent. First, he intends to make the instrument payable to the person before him. Second, he intends to make it payable to the person whom he believes the impostor to be. The courts have almost unanimously held that the first is the controlling intent. The court, in the Cohen case, did not expressly discount the "double intent" rule but stated that the evidence did not show an intention on the part of the plaintiff's agent that the impostor as a physical person should be payee; that the brief contact between the parties was insufficient to make the impostor, rather than the owner of the award, the object of plaintiff's agent's intent. In all similar cases in New York there had always been more extended contact between the parties than was true in the instant case. All prior cases were differentiated on this count.

The law is clear, yet its expediency dubious Into a definite, workable rule has been injected the necessity for a detailed consideration of the factual relationships between the parties. The policy which justifies this rule would seem to apply to a situation where only a small amount of prior dealing was carried on. The question will ultimately resolve itself into one of degree. How many times must a culprit solicit the victim before it can be said that the latter intended to deal with the culprit, himself? This question is necessarily attendant with difficulty.

Furthermore, the burden of discovering the impostor's identity is shifted to those who claim through him. In order to expedite the negotiability of instruments, this burden should fall upon the drawer,

since she is in a better position to make that discovery. The court is in fact relieving the drawer of the duty of protecting himself. Sound commercial policy might quarrel with this decision.

The question arises as to whether the court will apply this rule to the facts as they exist in the case of Phelps v. McQuade, 220 N.Y. 232. In that case the vendor delivered personal property to the impostor personally, relying on the credit of the person whom the impostor represents himself to be. The court held that the impostor obtained a voidable title to the goods, since the vendor intended to deal with the visible person and not the person he believed the impostor to be. No mention of prior dealings was made. A bona fide purchaser from the impostor obtains perfect title. Does the character of the property transferred offer a basis for distinction? Will the fact that some negotiable paper requires a later act - namely, endorsement by the payee intended, be considered? An endorsee from the impostor can require that the impostor identify himself as the payee intended but a vendee of personalty from the impostor has no possible means of ascertaining the extent of his title except by word of the impostor that he owns the goods. Is this an element to be given weight?

We anxiously await the answer the court will give this question.

R. F. C.

* * * * *

DOUBLE JEOPARDY.- An interesting sidelight upon the ever increasing problem of income tax collection is revealed in the recent case of Helvering v. Mitchell, U.S. 82 L.Ed.623.

The case is merely a reaffirmance of the power in the sovereign to impose a civil sanction where a criminal penalty has failed. It is interesting in its realization of a desired purpose in the Revenue Department in the recovery of a penalty of $300,000 after a criminal action had failed.

Charles E. Mitchell was indicted in Federal Court for the Southern District of New York under §146B of the Revenue Act of 1928, 26 U.S.C.A.(1934) 145, which provides: "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in addition to other penalties provided by law be guilty of a felony and upon conviction thereof be fined not more than $10,000 or imprisoned not more than 5 years or both together with cost of prosecution." The indictment was found pursuant to the finding by the Commissioner of Internal Revenue that respondent had failed to return the sum of $666,666.67 received by him as distribution from the management fund of the National City Company of which he was chairman by fraudulent deduction of an alleged loss of $2,872,305.50 incurred through the sale of 18,300 shares of National City Bank stock to his wife. Mitchell was tried and acquitted on all counts.

The present action was brought under the Revenue Act of 1928, Chapter 852, §293, 26 U.S.C.A. (1934) 145, to recover the sum fraudulently concealed, plus a 50% penalty based on the alleged fraud. Under this section it is provided: "If any part of any deficiency is due to fraud with intent to evade tax then 50 percentum of the total amount of the deficiency shall be so assessed, collected, and paid."

Pursuant to this section the Commissioner of Internal Revenue assessed the sum of $728,709.84 plus penalty of $364,354,92. The Board of Tax Appeals affirmed. The U. S. Circuit Court of Appeals affirmed the collection of the deficiency but held that the collection of the penalty was barred by the criminal action. 89 F(2) 873.

The U.S. Supreme Court in an opinion by Mr. Justice Brandies held that the provisions of §146b were remedial in nature, and not criminal. There is but one dissent in this case and that without opinion and the assurance with which the Court speaks indicates the facility of the distinction between matters civil and criminal even where the action founded upon an offense against the state.

The question as to whether a statute is penal as such or merely remedial is not resolved by the effect of its enforcement. It is a question of statutory construction. In regard to such civil sanctions the court points out: "In spite of their comparative severity such sanctions have been upheld against the contention that they are essentially criminal." The Court concedes that "Where the objective of the subsequent action likewise is punishment the acquittal is a bar because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction." The Court then attributes to the Congress the design to create a civil sanction merely regardless of the exact effect thereof. Nevertheless the apparent objective and effect is penal.

What criminal process failed to achieve has been attained by civil authority. In reality the respondent has been punished for an offense against the United States. In this matter of taxation the sovereign has been relegated to the stature of a civil litigant to avoid the contention of double jeopardy.

We cannot dispute the expediency of the decision. Being expedient, the Court has found legal justification for the truth. See Heppner v. U.S., 213 U.S.103, 53 L.Ed.720, 29 S.Ct.474; Murphy v. U.S. 272 U.S.630, 71 L.Ed. 446, 47 S.Ct. 218; Lloyd Sabaudo Society v. Elting, 287 U.S.329, 77 L.Ed.341, 55 S.Ct. 167. Contra: Coffey v. U.S., 116 U.S.436, 29 L.Ed.684, 6 S.Ct. 437; Stone v. U.S., 167 U.S.178, 42 L.Ed.127, 17 S.Ct.778.

The Court upon the realization of the necessity, whether it be political, economic or moral, permits it to dictate the law. Though there may be no case directly in point, the books are filled with cases indicating the sovereign authority of expediency. They are invoked to constitute the foundation and reinforcement of any holding which may wander from the dry path of legalistic logic because of the exactness and hardships of the demands of consistency. Here it is invoked to satisfy the demands of the sovereign against fraudulent tax evasion.

J. S. H.

* * * *

ANSWERS

1. No. Goldfinger v. Feintuck, 276 N. Y. 281. Law Review p. 89.

2. Yes. People v. Standard Plate Glass & Salvage Co., 174 A. D. 501. Law Review p. 94.

3. No. People v. Weiss, 276 N.Y.384. Law Review p. 105.

4. He may draw the draft to his order, endorse it "pay any bank or banker" and couple such endorsement with words indicating a trustee relationship. Or he may draw to the order of collecting bank, with a notation that the proceeds are to be remitted direct to the drawer, and not credited nor deposited. Negotiable Instruments Law §350-c. Mat. International Milling Co., 259 N.Y.77. Law Revie p. 98.

5. Apparently his liability continues, as the charge against his account was not "final." Neg. Inst. L. §350-f. Direct presentment of the item to A Bank is authorized by §350-c. Law Review p. 98.

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LEGISLATION AND THE SEAL

Of late, the seal and its effect upon instruments has undergone vital and demolishing changes in New York by Legislative Act (1935-1936). In order to obtain a better perspective of the nature and the consequences of this legislation, it might not be amiss, at the very outset, to discuss the background of the seal, its beginning, effect at common law, and the constant process of paring, both by the Legislature and the Judiciary, which has marked its existence.

From very early times, seals were used both for the purposes of authenticating documents - assuring their reliability and genuineness - and for the literal sealing of a document. On the Continent they were used during the Middle Ages to authenticate official decrees promulgated by kings and other ranking officials. The appearance of the seal in England is first manifest in charters of the Anglo-Saxons. Their use in this respect, however, was not a general practice. The first application of the seal to other instruments followed the conquest of the Normans as a natural consequence of the infiltration of their customs. At a period as late as Henry II, it is said that only the king and the great nobles had seals (Kent Com. 452). It soon displaced the time-worn "making of the mark" as a means of authenticating commercial documents. As this use became more common, the ordinary man used the seal of his lord or some great person, but in time the use of his own peculiar seal was common to every free man. The reason for this manifold adoption has been attributed to the fact that, men being unable to write, the seal became an easy means of identity and it made successful forgery a difficult accomplishment. Holdsworthy, History of the English Law (3rd Ed. 1922) 29.

At its inception, the seal consisted of an impression made in wax by one's peculiar stamp. Such were simple or extravagant, as the fancy of the individual dictated. To Lord Coke, a seal connoted wax upon which an impression was made, and mere wax without an impression was not good. Since the purpose of the seal is to identify, he reasoned, wax alone does not fulfil the object. While an impression of some sort was required until the 19th Century, this impression might be made by pressing in wax one's finger, an identifying object, or even the impression of the teeth. "A scrawl of the pen is not sufficient - The policy of the rule consists in giving solemnity to the execution of important documents, by which the attention of the parties is more effectually fixed, and frauds less likely practiced on the unwary." Warren v. Lynch, 5 Johns.238. As the seal developed the rules were relaxed and in New York by statute (Laws of 1892 Ch. 677). "The word 'seal' or 'L.S.' opposite the signature is sufficient." Williston, Contracts §207; Crane, "Magic of the Private Seal," 15 Col.L.Rev.24.

With its characteristic slavery to form, the common law entangled itself in rules of an artificial nature with respect to the seal. "The instrument", writes Williston, (Contracts §210) "was not evidence of the obligation but rather the obligation itself. Thus, even though an instrument had been paid or performed it remained a binding obligation unless cancelled or destroyed and could again be enforced against the maker. Furthermore the destruction of the instrument, even if by accident, destroyed the obligation. Perhaps the most striking example of this is to be found in the early law that one whose seal was attached to an obligation was bound even though his seal was stolen and attached without his consent." It is almost im-

possible to comprehend such fictions in view of our present development of contract rules, and yet for centuries the loss or destruction of a specialty contract, or the removal of the seal from it, resulted in the loss of the obligee's rights against the obligor. Conversely, the obligation of the specialty contract was binding in law until the specialty itself was released, cancelled or destroyed. If he could get possession, the obligee could enforce it a second time against the maker. Equity gave relief in the Seventeenth Century by compelling the obligee to perform, notwithstanding the loss of the specialty, and relief to the obligor who had paid by enjoining the obligee's action at law. It was not until late in the Eighteenth Century that this defense was made available at law by statute. Ames, Lectures on Legal History. (Specialty Contracts and Equitable Defenses) (1913) 104.

The seal from the time of its introduction into the English common law had effect, during its stages of development, upon consideration, the liability of principal and the Statute of Limitations. It was stated that a seal "imports a consideration" and thus both parties are bound in law and in equity. Livingston v. Trempner, 4 John 216; Bunn v. Winthrop, 1 Johns.Ch.328; Holdsworth (supra) 419. But such seems to be an incomplete statement. In reality, the attachment of a seal to an instrument made consideration unnecessary. It was enforceable by reason of the form and solemnity of execution. The courts of law considered the seal of such great import that fraud in the treaty could not be pleaded as a defense to a formal contract, nor could a release under seal be set aside because of fraud. Frachot v. Hoch, 5 Con. 506. Equity, however, was not so prone to attribute the common law strictness to the rule. Wadsworth v. Wendell, 5 Johns.Ch.224; Town of Solon v. Williamsburgh Savings Bank, 114 N.Y.122; Barnard v. Gontz, 140 N.Y.249.

As the pendulum of the courts moved in the direction of liberality, the Legislature fell into line. By the laws of 1830(2 Rev.Stat. 406), "In every action on a sealed instrument and where there is a set-off on such an instrument, the seal shall only be presumptive evidence of consideration, which may be rebutted as if the instrument were not sealed." This did not accomplish as much as might be assumed at first glance because by its very terms it was confined to two specific actions. Controversy immediately arose as to whether the statute was retrospective. Proponents contended that it was solely a rule of evidence and thus merely gave a new defense. On the other hand, it was asserted that since consideration was previously unnecessary, to make it now essential to instruments previously executed would destroy the obligation of contract. Mann v. Echford's Executors, 15 Wend.502.

The liberalization was not to stop at this point. In 1896, by §840 Code of Civil Procedure (later adopted into §342 C.P.A.) "A seal on an executory instrument hereinafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument were not sealed." Thus, under the statute, if the evidence overthrew the presumption arising from the seal, it could be defeated for a want of consideration. Baird v. Baird, 145 N.Y.659. The rules of consideration applied with full effect to releases and receipts, Striebel v. Grosberg, 202 N.Y.266; assignments, Hull v. Hull, 172 A.D.287; deeds, Grout v. Townsend, 2 Denio 336.

The seal was of importance also with respect to undisclosed principals. It was a primary rule that only those who appeared on the face of a sealed instrument might be sued or sue. The rule presented an incongruous situation. There was no liability to a principal on an instrument under seal executed by his agent. To relieve the harshness of the rule it was held that where the seal is not requisite to the validity of the contract, the court might disregard the seal and hold the principal as on a simple contract. Wood v. Wise, 153 A.D.223, aff'd 208 N.Y.586. As to an undisclosed principal where the seal was necessary, it set up an insurmountable barrier behind which the principal could act with impunity. 1734 Restatement of Law, Agency (1933) 191. Thus a situation was presented which placed the principal at a decided advantage. He could not be sued if he did not appear to be a party to the specialty. True, the converse applied and he could not sue, but such were mere empty word because in fact he could obtain all the benefits of a suit by an action by his agent. While the cases indicate a trend towards a contrary holding, principally Harris v. Shorall, 230 N.Y.343, a statement in this and other cases that a principal might be held was merely dictum. When the point was squarely before the court, Crowley v. Lewis, 239 N.Y.264, the court cited with approval, "We find no authority for the proposition that a contract under seal may be turned into a simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof dehors the instrument that the nominal party was acting as the agent of another and especially in the absence of proof that the alleged principal has received any benefit or ratified it." Briggs v. Partridge, 64 N.Y.357. And so, at such a recent time the court held th undisclosed principal was not bound.

The seal did not cast its shadow upon consideration and agency along. No deed of real property was effective as a conveyance unles it was sealed. Steibel case, supra. A private seal on an otherwise negotiable instrument destroyed the negotiability. Chase National Bank v. Farout, 149 N.Y.532. At one time the corporate seal was regarded as essential to the making of a valid contract by a corporation. Chase National Bank case, supra. Authority to execute a contract under seal had to be given by an instrument of equal dignity. If, however, "the instrument would be effective without a seal, the addition will not render the seal necessary if executed under parol authority or subsequently ratified by parol." Worrall v. Munn, 5 N.Y.229. A further incident of the seal was that such an instrument could be cancelled, modified, or revoked only by an instrument of equal solemnity. McKenzie v. Harrison, 120 N.Y.260. Here equity again modified the harshness, by providing, "where there was part performance by an instrument ineffective because of form, the informal instrument will be given effect to the extent it had been carried out. Coe v. Hobbey, 72 N.Y.141.

It was at this stage that the courts and the Legislature really began to make inroads upon the rule of the seal. Where the seal appears opposite the name of only one party, the other parties are regarding as having adopted it. Carmack v. Slattery & Bro.,Inc., 241 N.Y.39. Recognition of the seal in the body of the instrument by some phrase as "witness my hand and seal" is sufficient to show an intent to seal and any seal appearing thereon is presumed to have been affixed with such intent. Risling v. Union Pipe & Construction Co., 5 A.D.448, aff'd 158 N.Y.737. The Legislature did its part in displacing the formality attached to a specialty. "A seal is no longer necessary to a conveyance of real property." R.P.L.

§243. Since the adoption of the Uniform Negotiable Instruments Law, the presence of a seal does not affect the negotiability of paper otherwise negotiable. N.Y.Neg.Ins.L. (Cons.Laws.Ch. 43) 25.

Thus, the state of the law prior to 1935 was to the effect that a seal was merely presumptive evidence which might be rebutted, only parties to the instrument could sue and be sued, and the statute of limitations was twenty years (§47 C.P.A.) as distinguished from the six-year statute with respect to a simple contract. §48 Subd.1 C.P.A. With a view of changing this situation §342 C.P.A. was amended to read, "A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of a sufficient consideration. A written instrument hereafter executed which modifies, varies or cancels a sealed instrument, executed prior to the effective date of this section shall not be deemed invalid or ineffectual because of the absence of a seal thereon." (C.P.A.§342, L.1935 Ch.708 in effect Sept.1, 1935). Considering the first sentence the common law potency of the seal was not destroyed since it related merely to consideration leaving the undisclosed principal rule, and the statute of limitations untouched. The 1935 Statute abolished the one salutary aspect of the seal in that it provided a simple method for ending suits. The rule as to releases was that, as in other instruments, a seal might be substituted for consideration and in the absence of fraud it was conclusive against the party giving it. And yet, by its sweeping amendment the Legislature abolished the one redeeming feature of the seal. By the second sentence of the 1935 Amendment, it was limited by its very terms to apply to instruments executed prior to the effective date of the statute. As a practical matter nothing was accomplished by this sentence as its application would be negligible.

Cognizant of its shortcomings in 1935 and upon recommendation of the Law Revision Committee (Leg. Document 1936-No.65D) the Legislature again modified §342 C.P.A. in 1936 to read: "A seal upon a written instrument shall not be received as conclusive or presumptive evidence of consideration. A written instrument hereinafter executed which changes, modifies, or discharges in whole or in part a sealed instrument shall not be deemed invalid or ineffectual because of the absence of a seal thereon. A sealed instrument may not be changed, modified or discharged by an executory agreement unless such agreement is in writing and signed by the party against whom it is sought to enforce the change, modification or discharge. A sealed instrument so changed or modified shall continue to be construed as an instrument under seal.

"2. Subject to subdivision 1 and §47 of the Civil Practice Act the rights and liabilities of an undisclosed principal under any sealed instrument hereafter executed shall be the same as if the instrument had not been sealed." (Added L.1936 Ch.685, in effect Sept. 1, 1936 repealing §342 C.P.A. as added by L.1935 Ch.708).

"A written instrument, hereafter executed, which purports to be a total or partial release of a particular claim, debt, demand or obligation or a release in whole or in part of a mortgage, lien or charge upon personal or real property shall not be deemed invalid because of the absence of consideration or a seal." (Debtor and Creditor Law §243 L.1936 Ch.222, in effect Apr.3, 1936).

"1. An action upon a bond, the payment of which is secured by a mortgage on real property or a bond and mortgage so secured or upon a mortgage of real property or any interest therein must commence

within six years after the cause of action accrued. Where the action is brought for breach of covenant of seizen for the purposes of this section only it is deemed to accrue on an eviction and not before.

"2. This section shall apply to all causes of action enumerated in subdivision one, whether heretofore or hereafter accruing except that in the case of such a cause of action heretofore accrued, if, at the time this section takes effect, there remains thereon a period longer than six years, such period shall be shortened to six years from the effective date of this section and if there remains a period shorter than six years such period shall not be enlarged by reason of this section." (L.1938 Ch.499, in effect Sept.1, 1938).

It now seems that the purpose sought has been accomplished. The second sentence of the 1935 Amendment, which was probably the result of poor draftsmanship, has been corrected so as to apply to all sealed instruments so long as the executory agreement is in writing and signed by the party against whom it is sought to enforce the discharge, change, or modification. By the second subdivision the inequitable and out-moded rule as to undisclosed principals, was changed, making a sealed instrument for this purpose the same as a simple contract. And yet the valuable aid to settlement of litigation, namely, the release without consideration has been preserved by requiring merely a writing and absolving the need for consideration or a seal. By express exception, the twenty-year period for the Statute of Limitations §47 has been retained, adding, however, §47-a which makes a further exception inthe case of sealed bonds and mortgages, limiting such actions to the ordinary contract period of six years.

Successful at last, has been the efforts to make the seal impotent. Its long existence was characterized by a constant process of erosion culminated in the final absolution by the Legislature. Its usefulness having long vanished, it seems strange, looking in retrospect, that it was so long a rule in our modern system of law. Its boast was its antiquity and now another strict formalism of the common law has been wiped from the statute books. In truth, the seal has "lost its thunder."

HARRY STEPHEN CHRISTENSON, JR.

LEGAL ATTITUDE

The law with its inherent forces extends so deeply into every human life, exerting its profound influence on the course of human activity, that of necessity it commands a wide variety of human attitudes from society in the individual sense. The attitudes which it inspires are as variant as the social beings receptive of its influences. The attitude may be one of dread, fear, or defiance; hatre or devotipn; of disgust or profound respect. Perhaps the latter is the ideal, but that in turn is dependent in a large degree on the individual who entertains the respect.

We never can hope to achieve any clear conception of the law as a force. It is far too complex, too replete with conflicting ideas, philosophies and meanings. But correlation, imperfect as it may be, in our own minds of its significance as an instrument of both Justice and social progress,--its part in the ever-changing design of civilization, together with an appreciation of its needs and awareness of its weaknesses -- would be a rich merit for our thought and study.

What is the basis of the law? What is the foundation upon which our system of jurisprudence is erected? Legal scholars have approache the truth in arriving at behavior as the basis of the law, --the accepted standard of behavoir of any given social group, as dictated and construed by the leaders of various units within the particular society. The construction in turn reveals the blending of the hopeful voice of the idealist, the truth of the realist, together with the less palatable influence of the self-seeker temporarily bearing the symbol of sovereignty through the ascendancy of his political bandwagon to a place of power. Certain standards of behavoir have become so firmly ingrained that as we regard them at any given interval they constitute the very fibre of the law itself almost unbending in its stronghold in the minds of jurists. Other standards, if we m so label them, are merely legal springboards, extreme in character, the product of temporary influences surging through the mass of the people hungrily, perhaps expediently, accepted by them under the force of political or economic upheaval. Those worthy of permanence in the legal structure are so established. Those unworthy are discarded as serving only a temporary purpose or perhaps as the recession point from which a vindictive reaction may emerge. The public enthusiasm which gave them legal expression subsides leaving only a residue to find its way into the legal philosophy of the era.

It is well to argue abstractly, that behavior is the foundation of the law as we regard it; as the body of the law established by the courts and pronounced by the Legislature. But what in fact that behavior is or shall be at any particular time or over any given perio is evidence of a power. In whom that power shall be vested is in turn dictated by economic interest. That group which can promise the greatest economic benefits is the source of the power which in turn controls the behavior of the society. The political and legal philosophy of the society must conform to its economic interests if it is to find actual expression. It then is the law either by voluntar or enforced acceptance. The nature of this acceptance depends entirely on the temperament of the subjects upon whom it is imposed.

The strength and ability of any particular law or legal princip lies in the nature of its acceptance, that is, the attitude it creates upon those on whom it exerts its influence. When its operation and effect achieve the Truth as expressed in the ideal of legal at-

tainment -- Justice -- it must of necessity create an attitude of respect in the minds of those who can appreciate this beauty and feel its strength and righteousness. When its operation and effect work injustice, when its process is utilized as a cloak to hide dishonest purpose, distorted and flagrantly abused to justify in the letter but not in the spirit of the law, the self-seeking motives of that class or that individual who searches to defeat its design, the attitude it produces on the victim can be hardly more than one of bitterness and more unfortunate still, one of disrespect.

On such occasions the devotion to the law which we may enjoy should summon a course of action founded on constructive resistance and designed to eliminate the evil to render the process of the law less available to destructive forces that thrive on stubborn technicalities and outworn principles. This is not in advocacy of disobedience or contempt. It is rather an attack on passive obedience to legal results produced solely through the shortcomings and inadequacies of a growing instrument of social organization. It is in defense of the proposition that the law to which we are or may be devoted should be the servant of humanity rather than mankind the slave of a sovereignty. It is ordered that submission affords a certain physical comfort. Acquiescence presently affords asylum from fear. But that resort must be extremely vulnerable. It grants the restricted relief of mere postponement. The price it compels is abandonment of duty.

Constructive resistance alone can command the test of Truth. The alone can the justice of any given situation be found. Then the surviving ideal will find its way into the living body of the law. Justice may be the reward of obedience to duty.

Mr. Justice Cardozo in his inspiring essay "A Ministry of Justice"* tells us, "Sometimes the inroads upon justice are subtle and insidious. A spirit or a tendency revealing itself in a multitude of little things is the evil to be remedied. Not one of its manifestations is enough when viewed alone to spur the conscience to revolt. The mischief is the work of a long series of encroachments." He advocates a Ministry of Justice to afford a channel for organized resistance to the hardships and inadequacies of contemporary law, perhaps a tonic of exact science and philosophy added to the existing medium of experience. Resistance rather than the shock of rebellion must direct the course of the law. The law must be flexed to conform to the pattern of human activity. Constructive resistance assures and refines that quality. --Again quoting Judge Cardozo -- "The law has its 'epochs of ebb and flow.' One of the flood seasons is upon us. Men are insisting as perhaps never before, that laws shall be made true to its ideal of justice. Let us gather up the driftwood and leave the waters pure."** In this comforting leadership from the bench lies the pathway to reform, -- to the culture of respectful attitudes in the minds of men who feel its influence and greatness. In such healthful spirit lies the security of a democratic society and our traditional ideals of liberty. Constructive resistance must temper any extreme application of power whether the source of that power be from the Right or from the Left.

JAMES STUART HOLDEN

*35 Harvard Law Review 113, Law and Literature, by Benj.N.Cardozo.
**Idem.

THE BANK COLLECTION CODE - A COMPARISON

Andrew V. Clements

PART II

Medium of Remittance and Payment.- The collecting bank is permitted to receive and make payment of an item in various ways, by Code §§350-h, 350-i. The methods of payment and remittance may be classified as money, draft on a bank, credit, and set-off of exchanged items with settlement of balance by either one of the first three methods as may be customary in a local clearing house or between clearing banks. In both cases, remittance or payment, if the collecting bank requests or accepts an unconditional credit on the books of another bank for the item, it shall become responsible for the proceeds as though received in money.

The prior rule that only cash is legal payment for items presented through a collecting bank becomes obsolete. (Federal Reserve Bank v. Malloy, 264 U.S. 160, 68 L.Ed. 617, 44 S.Ct.296). The general practice on the part of banks to receive checks in conditional payment of obligations is recognized. While the customer's risk is increased - for if cash were demanded it would in most cases be paid - the collection process is facilitated. These Sections are also similar to Federal Reserve Board Regulation J, §V, Subd.3. (U.S. Pipe & Foundry Co. v. Hornell, 146 Misc.812, 263 N. Supp. 89).

The Act also permits remittance by draft on a bank as an act authorized by the customer, but it separates sharply from the Code where other customary methods of settlement are used, by placing the risk of such customary methods squarely on the collecting bank upon receipt, as for money. §32.

As the collecting bank may receive and remit in the form of a bank draft, the draft it has received in collection may be dishonore after remittance to the customer. Where provisional credit only has been given, the right to charge back is apparent. In other situation the bank stands in the position of a purchaser. The Code does not provide for this. The Act, §25, permits a charge back of such item, by treating the depositor as an endorser, which is claimed by the Draftsman to be not inconsistent with a purchase position. Though without clear support in the cases (Burton v. United States, 196 U.S. 283, 25 S.Ct.243; Noble v. Doughten, 72 Kan.336, 83 Pac.1048) the charge back practice is so general and of such long standing as to be a significant part of the bank-depositor relation. The effect of a charge back by this Section and §26 is to entitle the customer to possession of the item, revest in the customer the title of the bank, and operate as an assignment of all the bank's rights. If the charge back creates an overdraft in the customer's account the bank retains a prior lien interest in the item to the extent of such obligation. Support for this is found in Union Electric Steel Co. v. Imperial Bank, 286 Fed.857.

Payment may be received by the bank in any medium it may choose to accept, but with responsibility to the customer as for money, except that, if conditional payment is received by check or draft, subsequently dishonored, and proper steps are taken to charge secondary parties, the collecting bank will not be liable to the customer. §30. By requiring the bank to give proper notice to secondary parties, th

customer obtains the obligation of all parties to the paper, for what they may be worth, thus possibly minimizing his risk.

Election to Dishonor Items Presented by Mail.- The purpose of §350-j is to permit the collecting bank, at its option, to continue the liability of the drawer or maker and endorsers upon a check, not presented over the counter or through the clearing house, but by mail, where the drawee or payor defaults in making payment because of insolvency. Four contingencies are provided: where the payor's draft upon another bank shall not be paid in due course; where the payor, without request, tenders its own check or draft upon itself; where the payor gives an unrequested credit upon its books or the books of another bank; where the payor retains the item without remitting. If the payor promptly returns the item it cannot be treated as dishonored.

This Section is based upon the opinion that a drawer who gives his check upon a bank which cannot pay, should not be relieved of its obligation by the mere charging of the check to his account and the issuance by the drawee of a worthless draft therefor but should stand for the solvency of his bank, which is his paying agent, until the latter's draft is at last paid. (Roberts v. Fisher, 43 N.Y.159). Where such liability is continued, the recourse is upon the drawer and other prior parties and not upon the failed bank. If it is found impracticable to hold the drawer and other prior parties, the electio to dishonor need not be made, the draft given by the payor will operat as payment of the original item, and the owner will have recourse as a preferred creditor under §350-l.

This right of election is anomalous. A check is paid under §350- and yet may be dishonored. Read together, these sections mean that where an item is charged to the account of the maker it is paid; but even in such case the last collecting bank may elect with reasonable diligence to treat the item as dishonored for non-payment, with recourse against prior parties in the four designated instances. As th election may be made even where the drawee fails to remit, the intent of §350-f must comprehend every case where a check is presented by mail to the drawee and is charged to the account of the maker. It would make no difference whether or not the drawee is a collecting agent as well as a payor. The reasonable diligence to be exercised may not be measured by time alone, but may be dependent upon circumstances and conditions affecting the situation. (Jones v. Board of Education, Town of Pelham, 242 A.D.17, 272 N.Y.Supp.5). Whether such an election has been made will be determined by overt acts and not unexpressed intent. It is not enough that the acts were consistent wit an election to dishonor, they must point affirmatively to that purpos (Mat. State Bank of Binghamton, 152 Misc. 579, 274 N.Y.Supp.41). Whil the Section specifically authorizes the agent to make the election, i has been held such agent has not sole authority so to do; that it would be new doctrine to say that an agent may do what his principal cannot. (Mat. State Bank of Binghamton, supra).

By determining the point of time when payment occurs, as is done in §12 of the Act, an option or election to dishonor is unnecessary. Where a credit or remittance is set aside as a voidable transfer; or the payor close without paying, the item is regarded as dishonored by non-payment, the consequent delay being excused, except that retention of the item by the payor without payment, gives any holder to whom it has been charged back the right, within thirty days, to treat the item as paid and assert a claim against the proceeds of such closed bank.

The right tiven to treat as paid an item held by a bank in failing condition follows what is perhaps the leading case. (Baldwin's Bank v. Smith, 215 N.Y.76). It is claimed that lodging this right with the owner rather than with the collecting bank will be less confusing, and affords a fairer remedy to the forwarder. Whether the Code provision permitting the collecting bank to declare an item unpaid, although it has been charged to the drawer's account or the drawer has paid it in cash and received the item marked paid goes to an unwarranted extreme must await further judicial consideration. It is not realistic, and it will come as a shock to depositors to learn they stand as continued guarantors of the solvency of their bank.

Notice of Dishonor.- The Code §350-k is a necessary complement to the preceding provision. The Negotiable Instruments Law §§173-175 requires notice of dishonor within definitely fixed times. If dishonor may occur upon election, the time will be indefinite, and thus the notice under §§350-j and 350-k must be with "reasonable dili gence." In construing this Section, one court has said that the Legi lature must have intended to fix a time dependent upon all the circumstances and conditions of the situation, and, may be, had in mind that under the common-law rule "reasonable diligence" was exercised when the notice was given in time so as not to impair any of the rights of the party to be charged. (Jones v. Board of Education, Town of Pelham, supra). As election to dishonor is not within the purpose or intent of the Act, it contains no provision corresponding to §350-k of the Code.

Insolvency and Preferences.- §350-l of the Code attempts to determine the parties' rights upon the failure of the collecting or payor bank. First, when the item is in the possession of such bank, and failure occurs before actual collection or payment, the receiver shall return the item to the forwarding or presenting bank with reasonable diligence. Second, except where the item has been dishonored as provided in §350-j, if the payor bank has charged the account of the drawer (the drawer having sufficient credit) and failure occurs after such charging but before remittance to or settlement with the presenting or forwarding bank, the assets of the payor bank shall be impressed with a trust and the owner of the item shall have a preferred claim upon the assets of the payor bank, irrespective of whether the fund can be traced or has been intermingled with other assets. Third, if the collecting bank has received the proceeds of an item in any form, and failure occurs before remittance, the owner' rights are similar to those created by Subdivision 2.

This Section creates a trustee relation where the money has been taken out of the drawer's account, and also in the case of an agent collecting bank which has received the proceeds, except where the failed bank has been accepted as debtor. The Section does not apply to items presented by mail which, at the election of the presenter, are treated as dishonored by non-payment according to §350-j.

The case law on this point is in conflict. Some states adopted the so-called trust doctrine; New York rejected it. Under this doctrine, when a bank received an item drawn on it, stamped it paid and charged it to the drawer, it thereby appropriated a fund from the drawer's deposit which fund it held in trust to transmit and the owner, the beneficiary of that trust, was entitled to enforce it and thereby obtain preference. In most states a necessary element of that doctrine was that the drawee bank have on hand and on deposit in other banks an amount equal to the item which it stamped paid. In

other words, it was necessary that there be a res consisting of cash to which the trust could attach. There were other conflicting rules in various jurisdictions. Another rule considered unfair was that if a collecting bank accepted payment in other than cash, the collecting bank was liable. (Matter State Bank of Binghamton, supra).

The purpose of this Section, as it is eventually worked out by the courts, can have but limited application, for there can be no right of preference in the assets of a national bank. (U.S.C. Title 12 §194; Old Company's Lehigh v. Meeker, 71 Fed.(2d)280). Further, the Section creates rights only in a third party holder of an item drawn by a depositor in the ordinary sense of the word who had on deposit a balance to his credit equal to the item, and is not intended to protect the holder of a cashier's draft which is merely an acknowledgment of a debt. A bank does not have a deposit with itself. (Matter State Bank of Binghamton, supra).

It is difficult to conceive of a trust impressed upon assets for the benefit of a cestui que trust, and vesting in such cestui the right to a preferred claim upon the assets, and yet hold that such claim is not entitled to payment in full, but that is just what this Section clearly accomplishes. (Matter Brewer Co., 144 Misc.429, 259 N.Y.Supp.50).

Is the holder's preferred claim effective against all the asset of the bank, including the banking house, or is it limited to cash on hand? The courts have hesitated to limit the meaning of "assets", saying that if the Legislature intended to impress a trust only upon particular property, such as cash on hand, it could have easily so provided. (Matter State Bank of Binghamton, supra). In the same case it was said that though the result may be absurd, unjust, unfair and inequitable as against general depositors, such argument must be addressed to the Legislature, and not to the court.

In an effort to prevent an unjust result from such a preference, the State Superintendent of Banks has maintained that where all the assets are derived from the investment of deposits, or from investmen of permanent capital segregated and set aside for employment in the business, the claims of depositors should be preferred to any other claim. While conceding this to be both a reasonable and logical position, the court felt constrained to apply this Section as it was written. (Matter Brewer Co., supra). See also Queen v. Randall, 353 Ill.231, in which the holder of an ordinary certified check was given a preferred claim upon the insolvency of the drawee.

The Act impresses a trust upon unremitted proceeds, exclusing from assets previously acquired bank buildings, real estate, fixtures, and other equipment; and if the proceeds are in the form of a draft subsequently dishonored by closing of the drawer, the bank will not be deemed in possession of proceeds but shall hold the item for the disposal of its customer. The requirement for tracing is removed, as in the Code. §24. As the Act also adopts the trust or equitable lien doctrine, the difference in the statutes is in the meaning of "assets." The preferred claim is vitally necessary to both acts, for if items are to be permitted to be forwarded directly to the drawee bank by mail, and remittance received in the form of a draft, the customer must be protected by some device.

It would appear that the customer is in a very much weakened

position where the drawee is a national bank. Unless Congressional action is forthcoming, both the Code and the Act must be materially changed. It has been suggested that in lieu of preferences or allocating risks, the Federal Deposit Insurance Law might be extended to cover these situations. (46 Yale L.J.538).

The Act of the National Commissioners on Uniform Laws is much more extensive than the adopted Code. A large field has been compressed within the thirteen sections of the Code - a field containing several highly controversial matters. The Act consists of forty sections, exclusive of formal provisions, separated into four parts: General Provisions, Presentment and Payment, Rights upon Deposits, Responsibility for Collection. It is the fifth tentative draft and the product of several years discussion and analysis. Size alone does not lend superiority, but the increased length of the Act results from a consideration of several important and frequent phases of bank collections as to which the Code is silent.

The tenor of the Act is to allocate the risks as equitably as possible and at the same time give legal recognition to the practice and custom of banks. The Code of the American Bankers Association indicates a desire to shift the risks to the customer at every stage of the collection process. Probably no more thanthis may be expected of legal rules forumlated by interested parties. The very serious difficulty is that the Code has been adopted by several states, thus doubling the burden on the National Commissioners in obtaining adoption of the Act. Greater uniformity will be obtained under the present Code than by attempting to use the Code in some states and the Act in others. The solution is for the Bankers Association and the National Commissioners to produce by agreement a synthesis of both statutes and present it jointly to all the Legislatures, at the same time repealing the Code where it has been adopted.

USURY - CONDITIONAL SALES CONTRACTS

Our so-called Industrial Age, the result of man's creative genius with its mechanical improvements, its mass production and development of means of rapid transportation, has filled the world markets with many kinds of products. In order to keep the wheels of industry moving there must be a relatively quick turnover of the finished product. The problem of the average business man has been to create a desire in the public mind for his products, and after closing sales to receive cash payment as soon as possible. Modern advertising and high pressure salesmanship have been used to present his products to the public, and Credit Companies have provided him with the ready cash needed to carry on his business.

Realizing that credit is necessary for modern business and believing that some return or interest should be paid for the use of another individual's money, we are confronted with the problem as to whether or not the Government should control such transactions, and if so, to what extent. In the opinion of this writer the law should concern itself with providing the lender the opportunity of securing a fair return for the use of his money and with protecting the borrower from unjust demands on the part of the lenders.

The recent decision of Judge Tompkins of the City Court of Rochester, in Universal Credit Co. v. Lowell, 166 Misc.15, in holding a conditional sales contract void because of usury, undoubtedly handed the credit companies a severe jolt. If it stands, and the public learns of it, there can be no doubt that the profits of such companies will be cut down considerably. The case is of interest because of the wide spread use of such contracts and because it focuses our attention on the general rules of law in New York State regarding the question of usury.

The American Law Institute defines usury as "a bargain under which a greater profit than is permitted by law is paid, or is agreed to be paid to a creditor by or on behalf of the debtor for a loan of money, or for extending the maturity of a pecuniary debt, is usurious and illegal." (A.L.I.§526). Therefore, there must be a loan or a forbearance of money in order for a bargain to be usurious.

The exaction of interest was not illegal under the common law, but most of the states have made it so, as to some or all kinds of loans, by statute.

Section 370 of the General Business Law provides that "the rate of interest upon the loan or forbearance of any money, goods, or thing in action, except as otherwise provided by law, shall be six dollars per one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time." Section 371 forbids usury by stating that "No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action than is above prescribed.

Although the Legislature has thus fixed the legal rate of interes at 6% per annum, it has made a number of exceptions to the general rul

For example, where advances of money, repayable on demand, to an amount of not less than five thousand dollars, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security, any rate of interest agreed upon by the parties to the transaction shall be lawful. (G.B.L.§379; B.L. §108 Subd.3).

Under §46 of the General Business Law, pawnbrokers are permitted to demand and to receive from 1% to 3% per month, depending upon the amount of the loan and the length of time. Personal Loan Companies that are licensed by the State, may charge up to 3% per month on the so-called small loans which do not exceed three hundred dollars. (B.L.§352).

In regard to loans made to corporations, the lenders are permitted in their agreements to demand and receive any rate of interest they desire. The statute declares that "No corporation shall hereafter interpose the defense of usury in any action." (G.B.L.§374).

In Universal Credit Co. v. Lowell (supra), the plaintiff sought to replevy an automobile sold to the defendant by the Archer Motor Co., under a conditional contract of sale. Under the contract the vendor retained the title, with the right to retake possession on default of any of the stipulated payments. Originally the defendant signed a blank prepared by one of the agents of the Archer Co., which recited that the cash price of the new car was $777 and $14 for a heater. It further stated a trade-in allowance for the defendant's old car to be $262, and that the balance was to be paid in payments of $15 each with the entire balance due on the twelfth month.

About a week later the defendant and the Archer Co. executed the conditional sales contract in question, and it was assigned to the plaintiff on the same day. It recited the sale of the car to the defendant "for $262 on or before delivery" leaving a "deferred balance" of $683, which the defendant promised to pay at the office of the plaintiff in eleven monthly installments of $15 and one installment of $518.02. The plaintiff presented a card showing the items making up the deferred balance of $683 as follows: "Differential", $151.77; "Agency Reports" $1; "Recording" 25¢; "Amount of check $530.' The "Differential" included an item of $21.50 for insurance, so that the balance of $130.27 was the "carrying charge." Thus the carrying charge for $530, the balance of the cash price for one year, according to the court's computation, amounted to a charge of 24½%.

The defendant claimed the contract was usurious and void, that it violated §§370 and 371 of the General Business Law. The plaintiff argued that the usury prohibition had no application to a sale of personal property on credit. The court held that the contract was usurious and consequently void, saying, "I find that $130.27 of the so-called 'differential' was for one year's forbearance of $530 of the purchase price of the automobile in question. I further find that this was a violation of §§370 and 371 of the General Business Law, and by §373 thereof renders the contract of conditional sale void." The opinion condemns the use of fancy terms and other various devices used to evade the usury statutes. "Does calling it a 'differential' instead of interest save it from illegality? May interest masquerade as a 'differential' and so escape the penalty?" (Universal Credit Co. v. Lowell, supra.)

In answer to the plaintiff's argument that the usury statutes did not apply, the court followed the authority of London v. Toney, 263 N.Y.439. The court in the London case held: "The statute renders void any contract for the forbearance of any money whereby is reserved or taken any sum greater than the legal rate of interest. No statute and no decision by this court have been called to our attention by which forbearance of money must, in order to constitute usury be preceded by an actual loan. The contrary is true.....Either a loan of money or a forbearance of money may be usurious."

Thus a mere sale of merchandise in and of itself, where there is not a loan or a forbearance of money is not usurious. A merchant for example could fix the selling price of an article at $40, but tell a purchaser that if he paid cash the price would be only $35. Here there would be neither a loan nor a forbearance of money. However, the situation would be entirely different if he fixed the selling price at $35 and provided that the total cost would be $40 if paid in installments.

It is possible that the automobile dealers and the finance companies could get together and work out a plan fixing the price of a car at a set figure, but stating a lower price if cash was paid. If such procedure was followed, the auto dealers by selling their accounts receivable might simply be selling merchandise.

However, in the Universal case (supra), - and what actually take place in most of the transactions today - the court in effect found that the actual transaction consisted in the credit company lending money to the defendant by simply paying it directly to the auto dealer, and that in consideration of making such a loan a usurious rate of interest was demanded.

JAMES WILLIAM DOLAN

LABOR RELATIONS - CONTROVERSIES BETWEEN THE UNION AND ITS MEMBERS

There is no field in the law today out of which more interesting and important cases are arising than in that concerning labor relations. The courts are slowly working out principles and rules which will eventually become somewhat standardized and reliable, but which are at present constantly changing. (See "Labor Unions," Albany Law Review, Vol. VII No. 3, p.89, April, 1938).

The union has become the employees' main reliance in securing economic privileges. That membership in a union may also deprive a man of some of these privileges is likewise apparent. In O'Keefe v. Local 463 of Ass'n of Plumbers, 277 N.Y.300, we find an unusual set of facts. The plaintiffs are members of the defendant union. For many years, the Byrne Co., Inc., hired the plaintiffs as regular employees The union found that the Byrne Co. was paying some employees less tha union wages, and as a result, all plumbers working for that Company were removed from the shop for one year. Thus, through the proceedings of their own union, though no charges had been preferred against the plaintiffs, they lost, at least temporarily, jobs which they had held for long periods.

Claiming that the action of the labor union was arbitrary, unreasonable, and without authority under its constitution and by-laws, the plaintiffs in this action, sought to restrain defendant from "prohibiting the plaintiffs' former employer, the Byrne Co., Inc., from rehiring the plaintiffs to their former positions as plumbers and awarding to the plaintiffs damages for loss of wages while they were unemployed." The action was unsuccessful. The Court of Appeals through Judge Lehman stated, "The action of the union in removing them for one year from the shop where they have long been employed has caused great damage and hardship to them without any fault on their part. That damages has not been imposed as a penalty for wrongdoing nor with any malice toward them, but solely to promote the welfare of the union and achieve the objects for which the union was formed. The findings established that the action of the union was not only reasonably calculated to advance the objects of the union but was, indeed, necessary for its welfare."

Here we see an excellent example of the manner by which labor groups, or some of those within a particular group, may be deprived of advantages through membership in a union. No argument against unions is intended, but it should be brought home to all employees that disadvantages may be present when they join a union.

So far as the legal aspect of the case is concerned, it creates no new rule. Massachusetts courts have held the same way for several years. In Ryan v. Hayes, 243 Mass.168, (1922) a union had an agreement with an employer that only union men would be hired. The employer wanted to hire the plaintiff but told him he would have to join the union. This the plaintiff did, but then found that, by the union rules, he would have to await his turn "on the list" before becoming eligible for employment. An action to enjoin the union from interfering with his employment was unsuccessful.

The impression should not be gained, however, that members are

entirely without redress in the courts in actions against the unions. Particularly is this true in cases involving membership rights and privileges. "The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members." Polin v. Kaplan, 257 N.Y. 277. Though a court will not review the proceedings nor re-examine the merit of an expulsion from a union, it will interfere, "if an expulsion has been decreed for acts not constituting violations of the constitution and by-laws.....In such an instance, the expulsion is not within the power conferred by the contract." Polin v. Kaplan. The member may not only be reinstated, but may also recover damages arising out of the resulting loss of wages. In cases involving a suspension and fine or assessment our courts are also willing to investigate and determine whether or not the union acted within its constitutional power. Blek v. Wilson, 237 A.D.712, 262 N.Y.253.

A common criticism of labor unions has been based on the contention that they have made many demands but have assumed too few obligations. This argument usually arises out of disagreements between the unions and the corporations with which they have had dealings. In th cases cited above there is found a suggestion of the same weakness arising out of the relationship between the union and its members. A leaders of unincorporated associations the labor organizers must face the realization that the men over whom they now have power must be satisfied within the association if they are to remain loyal. Having based their hopes on labor groups rather than their employer, they look to such groups for economic benefits and not a loss of their livelihood.

FRANK SEYMOUR HIGGINS

N O T E S

THE RIGHT OF ASSIGNEE OF PERSONAL INJURY CLAIM TO SUE UNDER §109 OF THE INSURANCE LAW.- An assignee of a personal injury claim may not sue the insurance carrier on the cause of action given by §109 of the Insurance Law. This statute states that a policy of liability insurance must provide that the insolvency of the person insured shall not release the insurance carrier from payment of damages, and that in case judgment against the insured should remain unsatisfied, an action may be maintained by the injured person or his or her personal representative against the insurer.

It is well settled that a cause of action for personal injuries is not assignable. Likewise, prior to §109 of the Insurance Law, even the injured party had no cause of action against the insurer of the tortfeasor, because of lack of privity of contract. Burke v. London Guarantee & Accident Co.,199 N.Y.557. Thus, if the insured were insolvent so that the injured party could not satisfy a judgment against the insured, the insurer would in effect be released. Since the already insolvent insured party suffered no damage from the adverse judgment, there was deemed to be no loss for the insurer to indemnify. To correct this situation §109 of the Insurance Law was passed, and it expressly provides that "an action may be maintained by the injured person, or his or her personal representative, against the insurer."

In Jackson v. Citizens Casualty Co., 277 N.Y.385, the court held that the cause of action created by this statute could not be sued on by an assignee, but must be limited to those expressly entitled by the statute. Here, the plaintiff's husband was killed by an automobile driven by Juan Lord and owned by the Forbes Motor Agency. Plaintiff sued driver and owner, and recovered judgment against both. Execution against the driver was returned wholly unsatisfied, whereupon plaintiff sued defendant Casualty Company which had issued liability insurance to the driver, obligating payment of the judgment against him. The trial court's verdict was sustained upon an appeal by the car owner, whereupon plaintiff assigned to one Schauss, both the prior judgment and this cause of action against defendant insurer. Schauss at once moved to revive this action and substitute himself as plaintiff, but his motion was denied as a matter of law.

In sustaining this ruling, the Court of Appeals analyzed the wording of the statute and in view of the mischief sought to be cured by it, concluded it was drawn for the protection of injured plaintiffs. The statute expressly extends protection to "the injured person, or his or her personal representative." In construing statutes, it is a fundamental principle that specific mention of those to whom a right of action is given implies the exclusion of others. (Page 390). Since protection of the injured person was deemed the dominant note, the court decided it should go no further than was indicated by the language of the statute, which in clear and unambiguous terms showed the legislative intent to give a right of action to the injured person or representative, and not to an assignee. It is for the Legislature to expand the application of the statute should this limitation be too strict.

Two other points raised by appellant should be noted. First, it was urged that since the cause of action was created by the contract of insurance rather than by statute, it should be assignable equally with any other contractual right. But the court held that

the right accorded to the plaintiff owed its parentage not to the contract but to the statute. The insurance policy adopts under compulsion, the provisions of the statute. Hence it is idle to call this an action on contract rather than one under statute. (Page 392)

Appellant's second point was that upon entry of the judgment, the non-assignability of the cause of action is lost, and the right which survives is merely that of breach of contract of insurance, or one based upon the judgment obtained by the plaintiff. But, "a complete answer to this contention is that, prior to the enactment of the statute, no claim could be enforced successfully against the insurer, whether founded upon a breach of contract or upon the recovery of judgment. In consequence all rights of recovery, upon whatever theor are limited by the words of the statute and are given only to the injured party or to his or her representative." (Page 392).

Clearly the Jackson case is sound, for principles of statutory construction must be followed as they are here. And when such construction shows that a cause of action created by statute, by its very nature is valueless in the hands of a certain person, how that person may have acquired possession of the right should be of no moment and should in nowise affect the substance or value of that right in his hands. A sieve will not hold water, no matter what the mode of pouring the water into it.

A. G. C.

* * * * * *

CONTRIBUTION UNDER §211-a OF THE CIVIL PRACTICE ACT.- Where the plaintiff was injured as the result of passive negligence on the part of the owners of adjoining buildings, one of which is owned individually and the other by two owners, does §211-a of the C.P.A. require a contribution by the individual owner to one of the joint owners who has paid the judgment, of one-half or of one-third of the judgment? This is the interesting question raised by Wold v. Grozalsky, 277 N.Y.364.

Section 211-a of the C.P.A. reads as follows:

"Section 211-a. Action by one joint tort-feasor against another. Where a money judgment has been recovered jointly against two or more defendants in an action for personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment....."

It is the appellant's contention that, since the judgments were obtained against all the defendants, her pro rata share should be one-third.

This contention the court refused to adopt. ".....this purely mechanical or arithmetical method of arriving at the pro rata share by dividing the amount of the judgment by the number of persons against whom it has been obtained, will not be followed where the result is substantially inequitable." (Page 367). To the same effect is Martindale v. Griffin, 233 A.D.310, aff'd without opinion 259 N.Y.530. This

was a case wherein the plaintiff was injured as the result of a collision between an automobile in which he was a passenger, and another automobile. He recovered judgment against the driver, who was also the owner of one of the automobiles, and against both the owner and the driver of the other automobile. The driver-owner who had paid the judgment was permitted a contribution of only 50% against both the driver and the owner of the other car. It was the driver-owner's contention that the pro rata share of each defendant is to be determined solely by the total number of defendants against whom the judgment is entered, no matter what the relation between such defendants may be, or how many separate torts may have concurred to bring about plaintiff's injuries. The Appellate Division said, at Page 513: "We think that this contention puts altogether too strict a construction on the statute. There is a clear distinction between those who are direct participators in tort and those who are not, but who are liable to the injured party upon some other theory."

"It is apparent that when the Legislature added §211-a to the C.P.A. it intended that each joint tortfeasor, each active participant in the wrong, should pay his proportionate share of the injured party's damage, and that the whole, or a disproportionate part thereof, should not be borne by any one wrongdoer.

"There is a clear distinction between a direct participator in the wrong, and one who is liable only because he is responsible for the acts of one of said participators. A master is liable for the tort of the servant, while engaged in the scope of his employment, upon the theory that one who does an act by another does it himself. But in such a case, although both may be liable to the injured party, there is but a single wrong."

Drawing an analogy between the illustration and the case at bar the court said at Page 514 that the liability of the driver and owner of the second car was a unification; that Griffin's proportionate share of the judgment was one-half.

In determining the amount of the contribution it is evident that the court will strive to do justice between the parties. In reaching a decision in Wold v. Grozalsky (supra) the court, on the theory that liability arose out of the ownership of the houses, divided the liability among the owners of each house as a unit. The court draws a distinction between injuries arising from passive negligence and injuries arising from active negligence. In the case of active negligence the liability would arise out of the defendant's own negligent acts and not through ownership, and contribution according to the number of defendants against whom the judgment is obtained may be the fair and proper method. This appears to be a fair and proper distinction. The results obtained appear to be just and equitable.

T. D. N.

* * * * *

NURSERY TREES - EMBLEMENTS, REALTY OR PERSONALTY? - One subject which may be relied upon to cause bitter disputes between mortgagor and mortgagee is the problem of one who owns the crop, the trees, grass, and fruit after the mortgagor is in default, but before foreclosure. One side will contend that the above are personalty or, at least, emblements, and are removable at any time before actual sale under the mortgage. The other side will argue that they are realty and as such

are not removable after default if the security is thereby impaired.

The question of the right of removal of nursery trees after the mortgagor was in default but before sale recently arose in the case of Heller v. Anawalk Nursery Inc., 253 A.D. 380. The owner of the nursery gave two mortgages to the plaintiffs and later became bankrupt. The defendant is the trustee in bankruptcy and wishes a stay of the foreclosure sale and permission to sell the trees. The case was referred to a referee by consent in the lower court, who decided for the defendant's holding, in effect, that nursery trees are governed by the same results of law as emblements and that the mortgagor or his successor in interest is entitled to remove them at any time until the foreclosure sale. He also granted a stay of the foreclosure sale so that the trees might be removed.

The court reversing by a three-to-one decision stated that, "Emblements are the annual product or fruit of things sown or planted. In this state the rights of the mortgagor or mortgagee of land on which emblements are grown have been declared as follows: The mortgagor or one deriving title from him may remove the crop at any time prior to foreclosure sale, but upon the sale the crop passes with the land to the purchaser.

"Distinctions suggest themselves, however, between crops and trees cultivated in a nursery. The encouragement of agriculture, in which the rule with respect to emblements is said to have originated has little relationship to the cultivation of nursery trees, which i more of an industrial than an agricultural pursuit. Moreover, nursery trees (particularly those grown in a 'big tree nursery', with which we are now dealing) have a greater degree of permanency in the land than a crop which is harvested at the end of each growing season; and such trees are, therefore, now clearly a part of the realty, and have less of the characteristics of Personal Property than a growing crop or emblement."

The court then proceeded to say that the rule as to growing timber furnished a better guide than the doctrine of emblements. The owner of land may remove growing timber so long as the security of the mortgage remained adequate, but such removal after default is actionable waste for which the mortgagee may recover if his security is thereby impaired.

The opinion of the majority in declaring nursery trees to be part of the realty and not removable after default seems to be substantiated by the case of Hamilton v. Austin, 36 Hun 138, aff'd without opinion, 107 N.Y.636. That case holds that the owner's privilege of removing trees terminates on default, or at least no later than the commencement of foreclosure action.

However, the later case of Batterman v. Albright, 122 N.Y.484, caused the court some trouble and it is this case upon which the referee decided and upon which Taylor, J. based his dissent. This last case was a contest between a purchaser from the owner of the nursery stock after the mortgage had been placed on the property and the mortgagee purchaser after foreclosure sale. The court said, "And while the plaintiff, as against the mortgagor and without liability to the mortgagee, may have taken the nursery trees from the premises prior to the time of the foreclosure of the mortgage, he had no such

right, as against the purchaser or his grantee who had entered under the title perfected by the sale on foreclosure and the conveyance made pursuant to it." The majority opinion explainsthis away by saying that "foreclosure of the mortgage" might mean the commencement of the action rather than the sale, and also that the statement was mere dictum. Taylor, J. says that although this may be dictum as to that case, it states the doctrine which is in effect in this State.

The court decided very flatly in this case that nursery trees are realty and are to be treated as growing timber is treated in relation to mortgage foreclosures. Until this case is appealed to the Court of Appeals and reversed or overruled by another case we can take it as the law.

What the Court of Appeals will do to this case if it is appealed will be interesting. It seems that the majority were stretching a little to justify their position, that the dissent has the logic on its side.

T. H. I.

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